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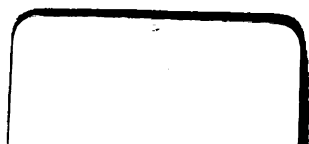
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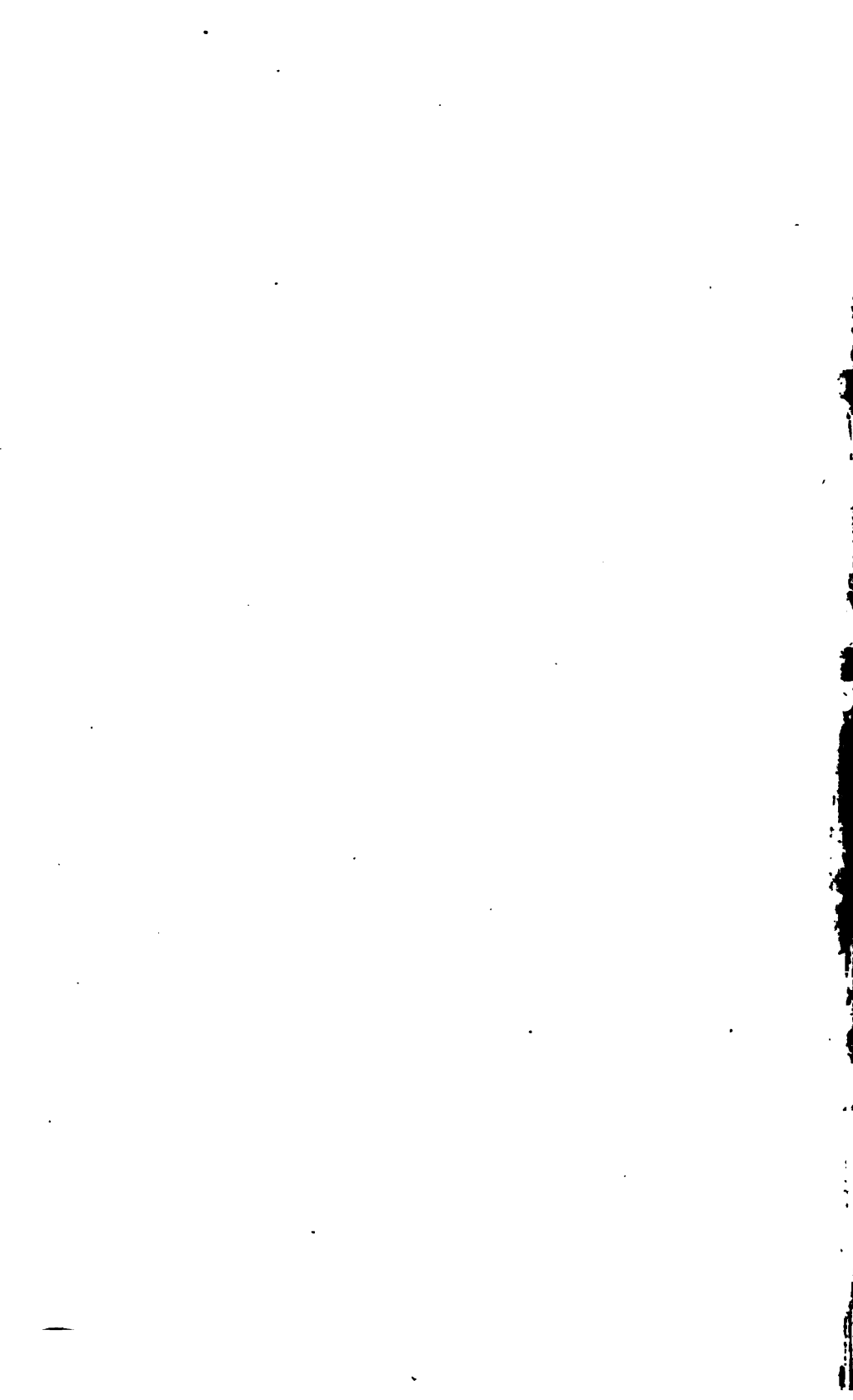
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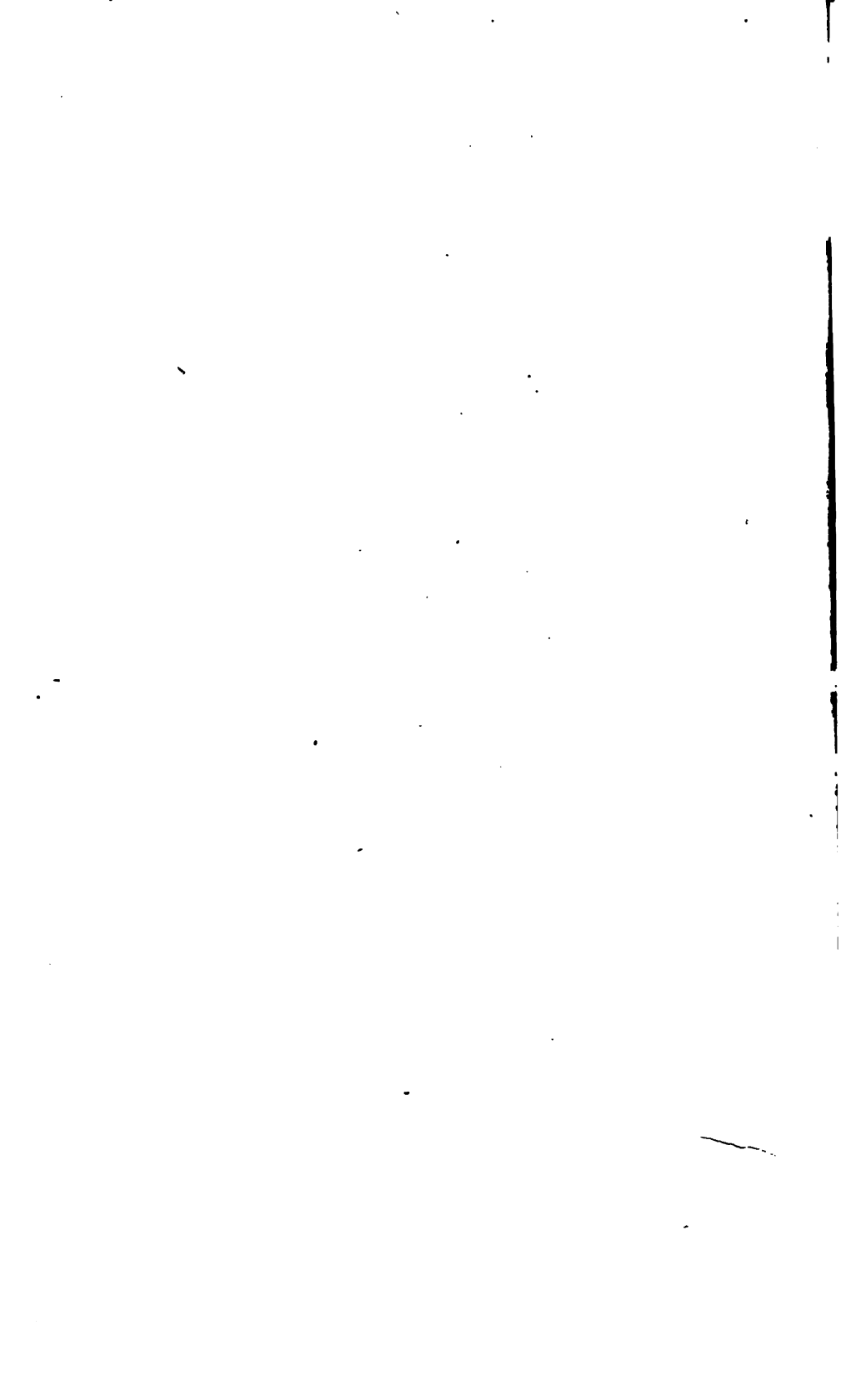
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A
GENERAL ABRIDGMENT
OF
Law and Equity,

ALPHABETICALLY DIGESTED UNDER
PROPER TITLES;

WITH NOTES AND REFERENCES
TO THE WHOLE.

BY CHARLES VINER, Esq.
FOUNDER OF THE VINERIAN LECTURE IN THE UNIVERSITY
OF OXFORD.

FAVENTE DEO.

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Descent.

(N. 4) To toll the Entry of what Person. In respect of the Right and Estate.

1. **A** Man recovered by erroneous judgment, and had execution and died, and his heir is in by descent, he who lost brought a writ of error, and reversed the judgment and was restored, he may enter upon the descent. Br. Entre Cong. pl. 105. cites 9 H. 6. 49.

2. Where a man disseises the heir and dies seised, and his heir enters, and the executors sell, the vendee may enter; for he has no right, nor no action; because he has only a title to enter by the sale, and therefore he may enter; for otherwise he has no remedy, per Hals J. Br. Devise, pl. 36. cites 1 E. 6.

3. Conusee of a fine upon grant and render is not barred of his entry by descent. Per Walmesley J. Ow. 141. 32 & 33 Eliz. C. B.

4. If a prebendary, bishop, or abbot be disseised, and afterwards he releases to the disseisor, this is an alienation whereupon a writ de fine assensu capituli may be had; and if the disseisor dies seised, the successor hath not any remedy but by this writ, or by a writ of right; but if the disseisor doth not die seised, the successor may enter, notwithstanding the release. F. N. B. 195. (B)

5. If a disseisor aliens in fee, and the alienee dies without issue, and the lands escheat, the disseisee may enter, because the Lord comes not to the land by descent. Litt. S. 390.

6. For albeit the alienee of the disseisor dies seised, and the Lord by escheat comes to the land by act in law, yet, because the land descended not to him, the entry of the disseisee in respect of the escheat shall not be taken away. For a dying seised and a descent, and not a dying seised and an escheat doth take away the entry. For (as hath been said) the descent is the worthier title. Co. Litt. 240. a.

7. But in that case, if the lord by escheat die seised, and the land descend to his heir, that descent shall take away the entry of the disseisee. Co. Litt. 240. a.

8. So it is if the disseisor die seised, and the heir of the disseisor dies without heir, the disseisee cannot enter upon the Lord by et-

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cheat.

The *Escheat* does not take away the entry, because, though in respect of a stranger's præcipe, the law do not cast the freehold upon the lord antecedent to his own act yet the lord

need not enter to take the profits, and to do the duties as the heir is

cheat. So as there is a diversity as touching the descent, when after a descent cast, the heir in fee simple dies without heir, for he in the reversion or remainder, or one upon the estate tail claims in above the estate tail, and the Lord by escheat claims in under the heir in fee simple. Co. Litt. 240. a.

obliged to do, but the lord may take the disseisee as his lawful tenant. And it is plain that the law doth not cast the freehold upon the lord in the same manner as it does upon the heir, because the lord is obliged to answer the feudal duties to the lord paramount, in respect of his feignory, whether this possession was cast on him or not; so that in this case there could be no failure of duty, though the lord does not enter. Gilb. Treatise of Ten. 22.

9. If the father make a lease for life, and has issue two sons, and dies, and the *tenant for life dies*, and the *youngest son intrudes* and dies seised, this descent shall not take away the entry of the eldest. Co. Litt. 243. a.

10. But if the father had made a *lease for years*, it had been otherwise; for that the possession of the lessee for years made an actual freehold in the eldest son. Co. Litt. 243. a.

[2]

11. So when the one *coparcener* does *specialty enter*, claiming the whole land, and taking the whole profits, she gains the one moiety, viz. of her sister by *abatement*, and yet her dying seised shall not take away the entry of her sister, whereas when one coparcener *enters generally* and takes the profits, this shall be accounted in law the entry of them both, and no deverting of the moiety of her sister. Co. Litt. 243. b.

12. If a man be *disseised* when he is *at large*, and the descent is cast during the time of his *imprisonment*, this descent shall bind him. Co. Litt. 259. a.

13. A *Reversioner disseises his tenant for life*, and dies seised, this is a descent to toll the entry of tenant for life. Hob. 323. cited by Hobart Ch. J. as 9 H. 7. but Hobart held, that it *will not take away the entry of a stranger*, because as to him it is an estate for life still, and but a fictitious descendible estate.

14. But if I *let lands for a term of years*, and another disseises me, and ousts the termor, and dies seised, I may not enter, but the lessee for years may well enter, because by his entry he does not oust the heir, who is in by descent of the freehold and inheritance which is descended to him, but only claims the lands for a term of years; so it is of a *tenant by elegit*, by *statute merchant*, and the like who have but a chattle and no freehold, but otherwise it is of an estate for life, or a higher estate. Litt. S. 411. and Co. Litt. 249. a.

15. If a *woman disseisores dies seised, having an husband and issue by him*, [who is tenant by the curtesy] and after the husband dies and the issue enters, the entry of the disseisee is not tolled, for that the issue came not immediately to the lands by descent after the death of the mother, &c. but by the death of the father. Litt. S. 394.

16. If a descent is cast in time of vacation of a bishop, &c. this doth not toll the entry of the *successor*. 2 Inst. 360.

17. If *baron and feme tenants in tail have issue and are disseised*, and a descent is cast, and the *baron dies*, and *before entry the mother dies*,

dies, the entry of the issue is not lawful, because he ought to claim as heir to both; and as heir to his father he is bound by the descent as his father was, and as heir to the mother only he cannot enter, for she had not any title; but if the mother had entered and recontinued the estate tail, the discontinuance would be purged, and the tail is actually vested in the wife, which after her death descends to the issue. 8 Rep. 72. a. Palch. 7 Jac. in Greneley's Case.

18. B. was assignee of a term for 99 years if A. lives so long. B. dies, living A. grantee of reversion enters and dies seised before grant of administration de bonis non; yet per Cur. after administration is granted, administrator de bonis non may have a special action of trespass. 5 Mod. 484. Hill. 9 W. 3. B. R. Trevellian v. Andrew.

(N. 5) Where disseisee may enter notwithstanding a descent.

1. IF a man abates, intrudes, or disseises another, and makes a feoffment in fee, and after the feoffee dies, the heir enters and onseizes the first abator, or intruder, or disseisor, he shall be adjudged in by this feoffor against all except those to whom he did the wrong, and against them he shall be adjudged in as he was when he first entered by wrong. Quod nota. Br. Disceit, pl. 23. cites 5 H. 7. 6.

2. A. devises land to be sold by his executors; A. dies seised, the heir of A. or a disseisor enters, and the heir or disseisor makes a feoffment of this land to B. B. dies seised and the heir is in by descent, yet the executors may enter into this land and sell it; for a descent takes away rights of entry, not titles or powers, as entry for condition broken, entry for mortmain; neither does it take away in the case of a devisee or patentee of land, where an abator enters before them and dies seised, for they have no other remedy; and executors have only a power; and when they sell the vendee is in by the will of the devisor paramount the descent. Jenk. 184. pl. 75.

[3]

3. If I let lands for 20 years, and another disseiseth me and ousts the termor, and dies seised, the lands descend to his heir, I may not enter, and yet the lessee for years may well enter, because that by his entry he doth not oust the heir who is in by descent of the freehold which is descended unto him, but only claimeth to have the land for term of years, which is no expulsion from the freehold of the heir who is in by descent; but otherwise it is where my tenant for life is disseised, causa patet, &c. Litt. S. 411.

4. A descent shall not take away the entry of a lessee for years, nor a tenant by elegit or statute merchant, or such like as have but a chattle and no freehold, because by their entry upon the heir by descent, they take no freehold from him; but otherwise it is of an estate for life or any higher estate. And as a descent of a freehold and inheritance shall take away the entry of him that right has to

a freehold or inheritance, so a descent of a freehold or inheritance cannot take away the entry of him that has but a chattle, for that no descent or dying seised can be of the same. Co. Litt. 249. a.

5. A descent does not take away the entry of a *man out of the realm at the time of the dying seised* if he were not within the realm at the time of the disseisin or dying seised. Litt. S. 440.

6. So it is of a man that is *in prison*. Litt. S. 436.

(N. 6) Entry of the Issue Justifiable in what Cases; though the Entry of the Ancestor was not.

i. IF there are grandfather, father, and son; and the *father disseises the grandfather and makes a feoffment* in fee without warranty, the grandfather dies. Albeit the right descends to the father, he cannot by this right descended enter against his own feoffment, but if he die the son shall enter and avoid the estate of the feoffee. Co. Litt. 247. b.

2. So if the *grandfather be tenant in tail* and the father disseises him, ut supra, mutatis mutandis. Co. Litt. 247. b.

(N. 7) Where it tolls the Entry of an Infant, Feme-covert, &c.

[4]

1. WHERE husband and wife are seised of a freehold, and after are *divorced* by suit on the woman's part, whereby she is to have all the land, yet if the *husband continues possession and dies seised*, this descent shall not take away the entry, for *he was no disseisor*, because he was legally in at first. Arg. Ow. cites 12 Aff. 22.

Co. Litt.
248. a.

2. An *infant who aliens* may enter upon a descent *had thereof in his non-age*, and *e contra* upon a descent *had after his full age*, per Littleton, for law, and it was not denied. Br. Entre congeable, pl. 129. cites 32 H. 6. 27.

Ibid. pl.
118. S. P.
cites S. C.

3. In trespass, it was agreed that *the heir of a man of non sane memoria* may as well enter after the death of his ancestor upon the feoffee, or the feoffee of the feoffee, as he might in case of a feoffment made by his ancestor, when his ancestor was within age. Br. Entre Cong. pl. 99. cites 12 E. 4. 8.

But if one
dies seised
in fee, and
leaves a
wife pri-
vileged

4. If an *infant be disseised* and a *descent cast during his infancy*, yet he may enter upon the issue which is in by descent; because no laches in such case shall be adjudged in an infant. Litt. S. 402.

enf. int, and a stranger abates and dies seised, *the child born cannot enter*, for he is not so much regarded in law, because he had no right to enter at the time of the descent. Co. Litt. 245. b.

5. B. tenant in tail enfeofs A. in fee. A. has issue within age and dies. B. abates and dies seised, the issue of A. being still within age. This descent shall bind the infant; for the issue in tail is *remitted*, and the law respects more an ancient right, in this case, than the privilege of an infant that had but a defeasible estate. It is said, if the king dies seised of land, and the land descends to his successor, that this shall bind an infant, for that the privilege of an infant in this case holds not against the king. Co. Litt. 246. a.

6. If husband and wife, as in right of the wife, have title and right to enter into lands which another hath in fee, or in fee tail, and such tenant dieth seised, &c. in such case, the entry of the husband is taken away upon the heir which is in by descent; but if the husband dies, then the wife may well enter upon the issue which is in by descent, for that no laches of the husband shall turn the wife, or her heirs, to any prejudice nor loss in such case, but that the wife and her heirs may well enter, where such descent is eschewed during the coverture. Litt. S. 403.

7. If a feme sole be seised of lands in fee and is disseised and then takes husband. In this case the husband and wife, as in the right of the wife, have right to enter, and yet the dying seised of the disseisor, in that case, shall take away the entry of the wife after the death of her husband, and the reason is, as well for that she herself, when she was sole might have entered and re-continued the possession, as also it shall be accounted her folly, that she would take such a husband which would not enter before the descent. Co. Litt. 246. a.

8. If a woman be within age at the time of her taking husband, then the dying seised shall not after the decease of her husband take away her entry, because no folly can be accounted in her; for that she was within age when she took husband, and after her coverture she cannot enter without her husband. Co. Litt. 246. b.

9. He who was out of his memory at the time of such descent, if he will enter after such a descent, if an action upon this be sued against him, he hath nothing to plead for himself, or to help him, but to say that he was not of sound memory at the time of such descent, &c. And he shall not be received to say this, for that no man of full age shall be received in any plea by the law to disavow his own person; but the heir may well disavow the person of his ancestor for his own advantage in such case; for that no laches may be adjudged by the law in him, which hath no discretion in such case. Litt. S. 405.

10. If a man becomes non compos mentis by accident, as by grief, sickness, &c. and he be disseised and suffers a descent, albeit, he recovers his memory and understanding again, yet he shall never avoid the descent and so it is a fortiori of one that has lucida intervalla. Co. Litt. 247. a.

11. If one out of the realm be disseised and a descent cast, yet his entry is not barred, whether he were in the king's service or not;

but if he were disseised before he went beyond sea, his entry is taken away by the descent. Hawk. Co. Litt. 343.

Litt. S. 436.
and Co.
Litt. 259. a.

12. If a man imprisoned be disseised, and a descent cast while he is in prison, yet may he enter; for by intendment of law one in prison is kept so close, that he has no intelligence of things done abroad, but if he were at large when disseised, a descent during his imprisonment binds him. Hawk. Co. Litt. 341. 342.

And if the descent be cast during the infancy of the disseisor (infant) the infant may well enter, either within age, or after his full age. Co. Litt. 248. a.

13. If an infant disseisor aliens in fee, and the alienee dies seised, and the lands descend to his heir being an infant, his entry is tolled; but if the infant grantor enters upon the heir of the alienee, as he well may, the descent being during his nonage, then the disseisee may well enter upon the disseisor. Litt. S. 407. 408.

14. As to infants, feme coverts, persons non compos, the descent to the heir of the disseisor doth not take away their entry, because the infants, &c. had a right of possession, and the act of law cannot take away that right, since no laches can be imputed to them; and since their negligence is not culpable, it were unjust to make market of their titles; and therefore the lord, when he takes a relief, is not supposed to transfer any jus possessionis to the heir of the disseisor, since the feud is not supposed, by negligence and want of a tenant, to fall into his hands, and from thence to be relieved to the heir of the disseisor, who has title thereunto, since if that were doctrine, a negligence were supposed in these incapable persons, which the law doth not allow. Gilb. Treat. of Ten. 28, 29.

15. But the non compos, in this case, cannot allege the disability in himself, because he cannot be supposed conscious of it; nor is he allowed ever at any time to allege it; for when he is once non compos, there is no certain time when he can be adjudged to recover that disability, unless where he is legally committed, and then the acts during the lunacy will be set aside and discharged, and afterwards the commission superseded; for in no other way can the non compos be legally restored to his right, and to his capacity of acting. Gilb. Treat. of Ten. 29.

(N. 8) What shall be said a dying seised of the Fee or Frank-Tenement.

1. IF an infant be disseised, and the disseisor dies seised, and after the infant comes to a full age and the heir of the disseisor dies before he enters; albeit he dies not seised of an actual seisin, but of a seisin in law, yet that dying seised shall take away the entry of the disseisee, and yet in pleading, the second heir shall make himself heir to the disseisor, and that land shall not be recovered in value for the warranty made of other lands by the first heir. But though the first heir had but a seisin in law, yet he is within the words of Littleton, for he was seised, and died seised in his demesne, as of fee. Co. Litt. 239. a. b.

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2. If

2. If a disseisor makes a gift in tail, and the donee discontinues in fee, and disseises the discontinuee and dies seised, the descent shall not take away the entry of the disseisee; for the descent of the fee simple is vanished and gone by the remitter, and albeit the issue be in by force of the estate tail, yet the donee died not seised of that estate, and of necessity there must be a dying seised. Co. Litt. 238. a. b.

3. No dying seised (*where the tenements come to another by succession*) shall take away the entry of any person, &c. as of prelates, abbots, priors, deans, or of the parson of a church or of other bodies politic, &c. albeit there were 20 dyings seised, and 20 successors, this shall not put any man from his entry. Litt. 8. 413.

This in the common law is applied only to bodies politic or corporate, which have suc-

cession perpetual, and not to natural men, as to a bishop and his successors, or to an abbot, dean, archdeacon, prebendary, parson, &c. and their successors, and not to J. S. or any other natural body and his successors, but to him and his heirs. Co. Litt. 250. a.

(N. 9) Entry tolled by Descent.

Revived in what Cases it may be.

1. *Grandfather, father and son, the son disseised J. H. and infeoffed the grandfather, who died seised; the father entered as heir to the grandfather, and leased to the son for term of another's life; the disseisee entered, the son brought assise and recovered; for the son had not the fee simple of which he was disseisor, but is now a purchaser of the frank-tenement for life, and the descent remains not purged; contrary if the son was heir to the descent.* Br. Entre congeable, pl. 127. cites 13 E. 3. Fitzh. Title 6.

If there be grandfather, father and son, and the son disseises one, and infeoffs the grandfather, who dies seised, and the

land descends to the father, now is the entry of the disseisee taken away; but if the father dies seised, and the land descended to the son, now is the entry of the disseisee revived, and he may enter upon the son, who shall take no advantage of the descent, because he did the wrong unto the disseisee. But in the case abovesaid, some have said, that where after such descent to the father he made a lease to the son for term of another man's life, upon whom the disseisee entered, the son brought an assise and recovered, and the reason that has been yielded is, for that the son had not the fee simple which he gained by disseisin, but is a purchaser of the freehold only from the father, and the descent remains not purged. Contrary it were, as it is there said, if the son were heir to the descent. But the book cited there in Fitzh. tit. Plac. 6. does not warrant that case; and I hold the law to the contrary, viz. that the disseisee in that case shall enter upon the disseisor, as well as if the father had conveyed the whole fee simple to the son, for in that also the descent to the father is not purged. If a disseisor make a lease to an infant for life, and he is disseised, and a descent cast, the infant enters, the entry of the disseisee is lawful upon him. Co. Litt. 238. b.

2. If land descends to a daughter within age, and after she is disseised, and the disseisor dies seised, and his heir enters, and after a son is born, he shall not avoid the descent; for he does not claim as heir to his sister, nor was he in esse at the time of the descent. Br. Descent, pl. 40. says quare the Reading of Whorwood.

3. If tenant for years holds over his term, he is tenant at sufferance, and his descent shall not take away entry; but if tenant for term of another's life holds over his term, he is an intruder, and his descent shall take away entry. Quod fuit concessum; per Dyer. Ow. 35. Mich. 13 & 14 Eliz.

Ow 96.

Arg. S. P.—
Cro. E. 920.
in pl. 14.

Hill. 45 Eliz. B. R. the S. P. seems admitted.

4. *A. devised lands to B. A stranger enters and dies seised before any entry by devisee, now is the devisee without remedy.* Arg. 2 Le. 147. pl. 182. Trin. 30 Eliz.

The law does not cast dower upon the wife but she take it by her own act; but when she is endowed, she is in from the death of her husband;

5. An entry being taken away by descent is *revived by the endowment of the wife* of the disseisor, albeit the tenant in dower shall have it but for her life; for that, though the heir entered, yet when the wife is endowed, she shan't be in by the heir, but immediately by her husband being the disseisor, who is in for her life by a title paramount the dying seised and descent, and therefore in judgment of law the descent was to the freehold, and the possession which the heir had is taken away by the endowment, because the law adjudges no mean descent between the husband and the wife. Co. Litt. 240. b. 241. a.

therefore she has only the naked possession her husband had, not any jus possessionis at all; since it was not of absolute necessity she should claim her dower; but it is of absolute necessity that the law does cast the freehold upon the heir. Now by the endowment the possession is avoided that the law cast upon the heir, because she, as is said, is in from her husband, and by consequence there is no right of possession as to this third part acquired to the heir at law, since the law doth not place him in such third part after the death of the father; and though the reversion belongs to him after the death of the mother, yet that is only the reversion of that which the mother possessed, which was a naked possession; and so he has herein no right of possession at all. Gilb. Treat. of Ten. 23, 24.

Litt. 8.

409.— If a disseisor that has

6. If a disseisor makes a feoffment on condition, feoffee dies, and feoffor enters for a breach, the disseisee may enter upon him. Hawk. Co. Litt. 333.

only a right of possession makes a feoffment in fee on condition, and the feoffee dies seised, this gains a right of possession to the heir of the feoffee; but if the condition be broken, and the feoffor enters, he destroys the estate, and the right of possession annexed to it; and he being only a disseisor is in his old estate, which is a naked possession without any right at all. Gilb. Treat. of Ten. 30. — Co. Litt. 248. a. S. P.

If termor enters before the descent, he reverts the freehold in the disseisor.

7. If lessee for years is ousted, and he in reversion disseised, and disseisor dies seised, though the lessor cannot enter, yet may lessee enter, for by it he defeats not the freehold that descended to the heir, but only claims to have the land for the term, which is no expulsion of the freehold. Litt. Sect. 411.

seissee, who has the right of possession; but if he enters after the descent then he can only hold in the name of the freeholder who has the present right of possession, which is the heir of the disseisor. Gilb. Treat. of Ten. 31.

8. If a disseisor makes a gift in tail, and the donee hath issue and dies seised, now is the entry of the disseisee taken away; but if the issue dies without issue, so as the estate tail which descended is spent, the entry of the disseisee is revived, and he may enter upon him in the reversion or remainder. Co. Litt. 238. b.

9. If after the dying seised of the disseisor, the disseisee abates, against whom the wife of the disseisor recovers by confession in a writ of dower; in that case, though the descent be avoided, as Littleton here says, yet the disseisee shall not enter upon the tenant in dower, because the recovery was against himself; but if he had assigned dower to her in pais, some say he should enter upon her. Co. Litt. 241. a.

10. If

10. If I be disseised by an infant within age, who aliens to another in fee, and the alienee dies seised, and the lands descend to his heir, being an infant * within age, my entry is taken away &c. But if the infant within age enters upon the heir which is in by descent, as he well may, for that the same descent was during his nonage, then I may well enter upon the disseisor, because by his entry he has defeated and taken away the descent. Litt. S. 407, 408.

Here it appears, that the entry of the infant is lawful and gives advantage to the disseisee to enter

also because the descent, which was the impediment is avoided. And it is to be observed, that if the descent be cast, the infant being within age, he may enter at any time, either within age, or at his full age. Co. Litt. 248. 2.

If an infant disseises, this only gives him a naked possession: for he has no privilege to do wrong; and if he aliens in fee, his alienation is voidable. If the alienee dies seised, he may enter; for though the descent gives a right of possession against the disseisee, yet it gains no right from the infant. If then the infant recovers, he is a disseisor as he was before, and being only in his former estate he has no right of possession against the disseisee. Gilb. Treat. of Ten. 29, 30

(N. 10) Prevented; How.

1. I N affise N. leased to P. for term of life. P. aliened to G. in fee. N. entered for the alienation, and G. re-entered and ousted him, and N. claimed and always was debating, so that G. had no peaceable possession, and G. of such seisin died seised, and his heir entered, and N. died, and the heir of N. entered upon the heir of G, and the entry adjudged lawful by reason of the claim and non-peaceable possession of G. Br. Continual Claim, pl. 8. cites 25 Ass. 12.

Br. Entro congeable pl 58. cites S. C.

2. By continual claim, duly made, he who makes the claim may enter upon a descent. Br. Enter Congeable, pl. 22. cites 9 H. 4. 5.

3. In affise it was admitted that if a bastard enters, and the mulier makes continual claim, and the bastard dies seised, and his heir enters, the mulier may enter, quod nota. Br. Continual Claim, pl. 3. cites 14 H. 4. 9. 10.

4. It was agreed that continual claim shall avoid warranty collateral descended. Br. Continual Claim, pl. 4. cites 14 H. 4. 13.

Br. trespass pl. 102. cites 14 E. 4. 13.

5. Tenant in tail of land devisable discontinued in fee, and re-took in fee and devised in fee, and died, the issue in tail is not remitted; for nothing can descend to him by reason of the devise, unless the devisee waives it. Br. Devise, pl. 49. cites 4 M. 1.

D. 221. 2. pl. 16. Pasch. 5 Eliz. Bishop v. Bishop S. P. held accord-

dingly by Welch, Weston, and Dyer; and affirmed afterwards at dinner by Saunders Ch. B. Brown and Whiddon. And yet there is a dying seised in the father of a fee simple, but the devise cut off the descent.—The freehold interest in law is in the devisee before entry, and nothing descends to the heir. Co. Litt. 111. 2.

(N. 11) Immediate Descent. What is.

[9]

1. **I**N assise against tenant by the curtesy, and the heir, the tenant by curtesy surrendered pending the writ, and died pending the writ, and yet the writ awarded good; for the heir came to the possession by his own act, and then the writ is once made good, notwithstanding that the heir by the surrender be in by descent; for the fee which is descended merges the frank-tenement; and per Rolf, if the heir be impleaded by writ of entry after the surrender, he shall be supposed in by his mother, and not by the tenant by the curtesy. Br. Descent, pl. 17 cites 1 H. 6. 1.

2. Where my father recovers in mortdancestor, and I sue execution and enter, I am in by the grandfather and not by my father, for he never had possession. Per Fineux, and non negatur. Br. Descent, pl. 67. cites 11 H. 7. 12.

And. 348.
pl. 323.

Hill. 37
Eliz. S. C.

says that
the greater
part of the
judges

agreed that
it is no im-
mediate
descent
by the
refusal of
the feme; and 354. says that Wray Ch. J. and Manwood in their life-time (but now dead) were of the same opinion, Mich. 29 & 30 Eliz.

3. Feoffment by A. to the use of the eldest son, and wife in tail, for jointure of the wife of lands in B. the father dies, the reversion of B. with lands in C. descend to (the baron) who devised by will in writing the lands in C. to the wife for life for her jointure, in recompence of dower and jointure, and if the wife claim other dower or jointure, the devise to the wife to be void. Baron dies, wife waved the jointure in B. en pais, and good. Adjudged, that the waver of the jointure made immediate descent by relation to the heir. Mo. 254. pl. 401. Mich. 29 & 30 Eliz. in Cam. Scacc. Butler v. Baker.

4. Where the widow had her frank-bank of an estate of copyhold in borough-English, and there were several sons by several venters, and all but the eldest died in life of the widow, upon her death he takes as heir to his father. Holt's Rep. 165, 166. Trin. & Hill. 5 Ann. B. R. Brown v. Dyer.

(N. 12) One or several. What shall be said one only, or several Degrees of Descent.

1. **I**N assise it was granted, that if disseisor leases for life the remainder over, and the tenant for life dies, he in remainder enters, there the estate for life, and the remainder make only one degree, and not the remainder a degree by itself, for the estate for life, and the remainder, are one and the same estate in law. Br. Enter en le per, pl. 9. cites 50 E. 3. 21.

2. If disseisor makes feoffment, and his feoffee makes feoffment over, and so on, so that the writ is come out of the degrees, and after it comes

comes again to the possession of the heir of the disseisor, yet writ of entry in the *per* does not lie, as he had it by descent; but *contra* if it had come to the disseisor himself, for this shall be adjudged in the first degree. Br. Enter en le *per*, pl. 1. cites 3 H. 6. 38. Per Cotesmore and Cur.

(N. 13) Devested.

[10]

1. **A** More near heir will devest a descent of them that were once in by descent, by a remote degree. As *A. died, having a daughter, his wife privement ensient of a son*, now this daughter is heir, and in by descent, but when the son is born he now shall be heir and the other descent avoided. Arg. Noy. 170, in the cases of the King v. Boraston and Adams. So where an uncle takes by limitations of estate tail by descent and afterwards a *posthumous* son of the elder brother is born, who is as well heir as male, the son shall have the land as the nearest and eldest heir male. Resolved. D. 373. b. 374. a. pl. 15. Mich. 22 & 23 Eliz. in the Exchequer chamber.

(N. 14.) Writ and count. In what cases it must be shewn from whom the descent is, or to whom the Demandant is Heir.

1. **I** *Formedon in descender*, if omission be made of any son or brother elder in the descent who survived his father, the writ shall abate notwithstanding that he did not hold estate; for he had right though he was not seised. Thel. Dig. 168. Lib. 11. cap. 50. S. 1. cites Mich. 4 E. 2. Formedon 48. But says, the contrary is adjudged, Mich. 11 E. 2. Formedon 56, where the writ was awarded good, where no mention was made of the eldest son, who had survived his father; for it is in the election of the demandant to name him or not. Per Herle. 8 E. 3. 379. See* 11 H. 4. 72. Agreeing.

2. In *Formedon* the writ was, that after the death of the donee it ought to descend to the demandant, as cousin and heir, and by the count he shewed how cousin, and held good. Thel. Dig. 108. Lib. 10. cap. 17. S. 11. cites Pasch. 5 E. 2. Formedon 51. But says, See 11 H. 6. 26. contra.

3. In *non compos mentis* omission in the descent of an elder brother, who survived the father, is not material, if he was not seised, or had released, or committed felony, or such like, &c. Thel. Dig. 169. Lib. 12. cap. 50. S. 16. cites Mich. 12 E. 2. Entre 70.

4. In *formedon by two sisters*, the writ was that after the death of the donee, and Jo. his son, *præfatis petentibus filiabus le donee descendere debet* &c. and adjudged an ill writ, because there is not any privity in the writ, between Jo. and the demandants. Thel. Dig. 108. Lib. 10. cap. 17. S. 12. cites Mich. 2 E. 3. 45.

* Br. omission, pl. 7. cites S. C. and see tit. Formedon (H) pl. 19. S. C.

5. In *formedon in reverter* he ought to make descent from none but those who held estate. Thel. Dig. 169. Lib. 11. cap. 50. S. 17. cites 3 E. 3. *Formedon* 43.

6. The gift was to Jo. and If. his feme, and to the heirs which Jo. should beget of the body of If. and the writ was, that post mortem Jo. and If. præfat' petenti filio & hæredi prædict' Jo. and If. descendere debet, &c. and held good, that he is made heir to both. Thel. Dig. 108. Lib. 10. cap. 17. S. 13. cites Hill. 3 E. 3. 68. 94.

[11]

7. And a writ brought upon such a gift, making the demandant son and heir to the father only, was abated. Thel. Dig. 108. Lib. 10. cap. 17. S. 13. cites Trin. 4. E. 3. 157.

8. Where land is given to one Jo. with Alice his feme in frank-marriage, the issue in *formedon* shall make himself son and heir to his father and to his mother, notwithstanding that the words of the gift are not to the feme. Thel. Dig. 108. Lib. 10. cap. 17. S. 14. cites Hill. 4 E. 3. 118, and 10 E. 3. 537.

9. In *formedon* upon *insinul tenuit* of the moiety of a manor, which was given simul cum alia medietate, in making the descent by the count it is not good to say, that from the donee the right descended to one sister of the one moiety, and to the other sister of the other moiety, but he ought to make the descent in common to both of the entire, or of the right of the entire. Thel. Dig. 168. Lib. 11. cap. 50. S. 4. cites Mich. 5 E. 3. 241.

10. In *cofsinage* of a manor, if *nontenure* of parcel be pleaded to the writ, it suffices for the demandant, to maintain that he was tenant as amply as the manor was in the seisin of his cousin, or as fully as the demandant demands it. Thel. Dig. 226. Lib. 16. cap. 7. S. 16. cites 5 E. 3. 225.

11. Where land is given to Jo. and Alice his feme, and to the heirs of their two bodies issuing, who have issue, and Jo. dies, and Alice survives and dies, the issue within age, in writ of ward he ought to make the issue heir to Alice, because she died tenant after Jo. Thel. Dig. 169. Lib. 11. cap. 51. S. 2. cites Mich. 7 E. 3. 349. and says see 41 E. 3. 15. agreeing.

12. The writ of *formedon* was of a gift made to R. in tail, quæ post mortem prædicti R. & Galfr' filii præd' R. Johanni filio & hæredi præd' Galfridi descendere debent, &c. and the writ was abated; because none was made heir to R. the donee. Thel. Dig. 108. Lib. 10. cap. 17. S. 1. cites Mich. 10 E. 3. 530. 11 H. 6. 25.

13. In *formedon in reverter*, where one Will' was donor, the demandant counted inasmuch as the donee died without heir, that the right reverted to Will' and from Will' inasmuch as he died without heir of his body, the right of the reversion resorted to Amice, as to aunt and heir of Will. scil. sister of Estien, father of William, and from Amice it descended, &c. to Ro. as son and heir, and from Ro. to the demandant. The tenant pleaded, that Will' had a brother and heir named Valentine who survived him, of whom omission is made in resort; judgment of the count &c. upon which it was held, that this plea is to the action, and not to the writ. And it was said by Ald. that omission of blood is no plea but in writ of right; for in all other writs he need not make mention of those who survived, if they

they were not seised. Thel. Dig. 168. Lib. 11. cap. 50. S. 6. cites Trin. 10 E. 3. 520.

14. In *formedon* of a gift made to Jo. and Jane his feme in tail, and the demandants were their sons and heirs in gavelkind, the tenant said, that their mothers name was Mariot, judgment of the writ, and held a good plea, but not after the view. Thel. Dig. 168. Lib. 11. cap. 50. S. 5. cites Hill. 10 E. 3. 490.

15. In *formedon* by the younger son of land in *Borough-Engliff* given in tail, by the writ he shall suppose the descent to him as son and heir, as if he was heir at the common law, and by his count he shall make his descent by the custom; and so it shall be, of land in gavelkind. Thel. Dig. 87. Lib. 9. cap. 7. S. 32. cites Hill. 11 E. 3. Formedon 30. 13 H. 4. Garrant 94. Trin. 11 H. 6. 54.

16. In *formedon* in reverter by the writ it was supposed that the donor was cousin to the demandant, and by the descent in the count it appeared that the donor was great-great-grandfather to the demandant, and adjudged good; for when a man passes great-grandfather paramount, there is no other form than cousin, and not the great-grandfather's father. Thel. Dig. 84. Lib. 9. cap. 5. S. 28. cites Mich. 15 E. 3. Brief 322. and that so agrees Hill. 21 E. 3. 10.

17. Where land is given in tail, the remainder to two and to their heirs, the heir of the other shall have *formedon* of the whole, as heir to the survivor, without supposing by the writ that his ancestor survived. Thel. Dig. 108. Lib. 10. cap. 17. S. 5. cites Trin. 18 E. 3. 28. 8 H. 6. 25.

18. In *scire facias* by one Jo. out of a fine by which land was rendered to one B. his grandfather in tail, and made himself heir to his grandfather and son to his father and not heir to his father, and adjudged good. And he had not supposed the death of his father, and yet good. Thel. Dig. 108. Lib. 10. cap. 17. S. 2. cites Mich. 23 E. 3. 22.

19. In *formedon* in descender the demandant made himself heir to his grandfather, and it was pleaded that the father of the demandant was seised after the death of the grandfather, &c. to which it was replied, that the seisin of the father was jointly with his fem.; and this in the life of his grandfather, which estate he continued till he died, and that the feme is yet alive, &c. upon which the writ was awarded good. Thel. Dig. 169. Lib. 11. cap. 51. S. 5. cites Trin. 27 E. 3. 81.

20. In *formedon* the demandant ought always to be made heir to the donee, or heir to him who is made heir to the donee before in the writ. Thel. Dig. 108. Lib. 10. cap. 17. S. 3. cites Hill. 29 E. 3. 39 E. 3. 13. 11 H. 4. 72. and 11 H. 6. 25. and 8 H. 6. Formedon 4 Reg. 238.

21. Omission in the descent of one who was born out of the liegeance of England shall not abate the writ. Thel. Dig. 169. Lib. 11. cap. 50. S. 15. cites Pasch. 31 E. 3. Cofinage 5.

22. In ward by reason of the nonage of Jo. Son and heir of Rich. the defendant said, that Jo. had an elder brother, who was seised after the death of the father, so ought Jo. to be made heir to his brother, &c. by which the writ abated. Thel. Dig. 170. Lib. 11. cap. 51, S. 13. cites Pasch. 32. E. 3. Gard. 34.

23. In

23. *In writ of right he ought to make mention of all, &c.* as it is said. Thel. Dig. 168. Lib. 11. cap. 50. S. 6. cites 35 E. 3. Droit. 30, 47.

24. *The grandfather, tenant in tail, enfeoffed his son, being within age, and his feme, and to the heirs of the feme, and died, and after the son died, and the issue of the son brought formedon against the feme, making himself heir to his grandfather, and the tenant passed the writ notwithstanding that it seemed that the feisin of his father, after the death of his grandfather, was his better right, and so the demandant ought to be made heir to his grandfather, quere.* Thel. Dig. 169. Lib. 11. cap. 51. S. 6. cites Mich. 38 E. 3. 29.

25. *Land was given to one Ro. and Ka. his feme, and to Jo. their son, and to the heirs of the body of Jo. Remainder to the right heirs of Ro. and Ka. and one W. son and heir of Ro. brought formedon, supposing the death of Ro. and Ka. and of Jo. without issue, and making himself heir to Ro. only, without alleging that Ro. survived Ka. and the tenant passed over; quere.* Thel. Dig. 108. Lib. 10. cap. 17. S. 4. cites Mich. 38 E. 3. 31. 18 E. 3. 28. and 24 E. 3. 28.

26. *Scire facias out of a fine, by which land was rendered to one Katharine and to her heirs which Will. her husband should beget on her body, &c. and one who demanded execution made himself heir to William and Katharine, by which the writ was abated; for he ought to make himself heir to Katharine alone by the manner, &c.* Thel. Dig. 108. Lib. 10. cap. 17. S. 7. cites Mich. 41 E. 3. 24.

[13] 27. *In writ of cosinage, if it appears by the count and descent that writ of besaile lies in the case, it shall abate.* Thel. Dig. 117. Lib. 10. cap. 27. S. 4. cites 46 E. 3. 15.

28. *In ravishment of ward, supposing the infant to be heir to his father, it was pleaded that after the death of the father, the land descended to one Ro. eldest son of the father, and so ought the infant to be made heir to his brother, &c. adjudged a good plea.* Thel. Dig. 170. Lib. 11. cap. 51. S. 10. cites Mich. 9 H. 4. 3.

29. *[So] in ravishment of ward, supposing the infant to be heir to his father, it was pleaded to the writ that his grandfather survived his father, and so he should be made heir to his grandfather, &c. and adjudged a good plea.* Thel. Dig. 170. Lib. 11. cap. 51. S. 11. cites Hill. 14 H. 4. 16.

30. *Where Thomas earl of Lancaster was attainted, which attainder at the suit of Henry his brother was reversed by parliament in the time of E. 3. out of which king H. 4. good scire facias for the manor of which the said Thomas was seised, &c. and by the writ he made himself heir to Thomas and not to Henry who was party to the reversal, and yet adjudged a good writ.* Thel. Dig. 108. Lib. 10. cap. 17. S. 8. cites Hill. 10 H. 4. 7.

31. *Writ of cosinage of the feisin of the uncle shall abate.* Thel. Dig. 117. Lib. 10. cap. 27. S. 4. cites Pasch. 2 H. 5. Cosinage. 1.

32. *And where the land is rendered to the baron and feme in tail, he ought to make himself heir to both.* Thel. Dig. 108. Lib. 10. cap. 17. S. 3. cites 8 H. 6. 47.

33. The

33. The baron and feme recovered in cessavit, and the heir of the feme sued scire facias, and made himself son and heir to the feme only, and adjudged good; for the recovery was in right of the feme. Thel. Dig. 108. Lib. 10. cap. 17. S. 10. cites Hill. 8 H. 6. 25.

34. If two men, as younger brethren, will make their title to land in gavelkind, they must say that the same land is of the tenure and nature of gavelkind, which time out of mind hath been parted, and partable between heirs males. Calth. Reading, 44.

35. The reversion in fee is part of the old estate, and if the owner had the land as heir of the mother, the same shall descend to the heir on the mother's side; so if it was borough-english or gavelkind it shall descend accordingly. 3 Wm.'s Rep. 63. Trin. 1730. in case of Chester v. Chester.

(N. 15) Pleadings.

1. **I N** *formedon*: to say that the demandant has an elder brother in full life, is a plea to the action. Thel. Dig. 168. Lib. 11. cap. 50. S. 7. cites Mich. 18 E. 3. 34.

2. In *assise*, the tenant pleaded a dying seised of his grandfather in fee, and that his father entered as heir, and was seised in fee and died seised, and he entered as heir, and awarded ill; for two dyings seised shall be double. Br. Double, pl. 86. cites 30 Ass. 6.

3. If a man has a son and is outlawed, and after purchases charter of pardon, and purchases land and dies, his son shall inherit him, per Cockain and Marten J. Br. Discent, pl. 8. cites 9 H. 5. 9.

4. In pleading of descent the words are, *that the tenements descended, &c. ut filio & heredi vel ut consanguineo & heredi, &c.* And in justification of bailiff, he shall say that he *ut bailivus, &c.* and need not say that he is bailiff, or heir in fact, quod nota; per Cur. Br. Pleadings, pl. 132. cites 5 H. 7. 2.

5. If a feme conveys to herself title by lineal descent, as heir of her father, tenant in tail after the death of her elder brother, she shall not shew in her writ that he is eldest son, or that his brother died without issue, or that if a daughter be heir, to say that her father had no son, or that her brother died without issue, or is appealed of death by brother and heir, or such like, to say that he had no feme; for those are intended, till the contrary be pleaded. *But contra upon collateral title*, as *formedon* in remainder or reverter, or writ of escheat; for there the dying without issue shall be shewn in the writ, and the dying without heir; but *there is no difference between lineal descent and collateral descent*. Br. Faux Latin, pl. 110. cites 7 H. 7. 7.

6. Plaintiff counted of a box with charters and muniments, and made the descent of the land from A. to T. and from T. to J. and from J. to the plaintiff, the defendant said, that A. had no such son as T. father of J. and this is pregnant, viz. that A. had no such son as T. and

Br. Char-
ters de
terro, pl.
21 cites
14 H. 4. 23,

24. 27. and
21 H. 6. 1.
S. P. T. and that T. was not father of J. and therefore ill, by which he said that T. was not father of J. and ill, because he gave no father to J. by which he said that J. was the son of P. and not the son of T. and the others e contra. Nota. Br. Pleadings, pl. 20.

7. The descent is *traversable* in no case but where both parties claim by the same person. Per Periam J. Cro. E. 278. in case of Mason v. Nevil.

8. Defendant pleaded that he was *heir a parte materna*, but did not say he was heir of the *whole blood*, and for that reason the plea was over-ruled. Per Jeffries C. Vern. R. 442. Hill. 1686. Addison v. Hindmarsh.

(O) Continual Claim.

In what Cases the Claim made by one shall serve for another.

[1.] F there be *tenant for life*, the remainder over, and tenant for life makes a claim, and after the *disseisor*, or he that is seised &c. dies seised (*) within the year, and after the lessee dies before entry, yet he in remainder shall have advantage of this claim, because he himself could not have made a claim, and the descent shall not bind the lessee, and therefore shall not bind the remainder. Litt. S. 416.]

(*) Fol. 630.
Co. Litt. 252. a. S. P. and says that so it is of him in the reversion in fee in like case; for he is also privy in estate.

[2. But it seems in this case that if the lessee for life makes a claim, and dies, and after the disseisor dies seised within the year, that this descent shall bind the remainder, because he might have made a claim after the death of the lessee, and he is not privy to the claim of the lessee, not coming under him, and the claim ought to be continued till the death, which it is not here; ergo.]

Co. Litt. 252. a. S. P.

[3. If two joint-tenants are disseised, and one makes claim, and after the disseisor dies seised within the year, it seems that this shall not take away the entry of the other joint-tenant, but that this * claim by one shall serve for both, because the entry of one is the entry of both, and otherways there would be a severance of the jointure, which cannot be by such an act.]

Co. Litt. 252. a. S. P. accordingly in respect of the privy of their estate.

* [15] [4. But it seems in this case, that if that jointenant that made a claim dies, and after the disseisor dies seised within the year after the claim made, that this descent shall take away the entry of the survivor for the whole, for that though the claim of one should serve for both during their lives, by a consequence to avoid the severance of the jointure, yet this mischief is not in this case, and the survivor comes paramount the claim, and so not privy to it, and so the claim is determined before the death of the disseisor, and as it seems the claim ought to continue till the dying seised. But quere this, for it hath been argued for a point.]

[5. If

[5. If the tenant be disseised, and makes continual claim and dies without heir, and after the disseisor dies seised within the year, this shall bind the lord by escheat, because he comes paramount the claim and not in privity thereof; and he might have made a claim after the escheat.]

[6. If the baron makes a continual claim, and dies, and after the disseisor dies seised within the year after the claim, yet it seems the wife shall be bound, because she is not privy to the claim, nor comes under it, and she herself might have made a claim. But *quare* this.]

[7. If the father be disseised, and makes continual claim, and dies, and after the disseisor dies seised within the year after the claim, yet this shall not bind the heir of the father, because he comes in under the father, and in privity of blood and estate, and therefore he shall have advantage of the claim of the father without any new claim by himself. 9 H. 4. 5. Curia. Litt. S. 421. admitted the claim shall serve for him and his heirs. Contra 15 E. 4. 23.]

[8. If a prior be disseised, and makes continual claim and dies, and after the disseisor dies seised within a year after the claim, in the time of the successor, this shall not bind him, because he comes in in privity of him that made the claim, and under him. Contra 22 H. 6. 37. b.]

Br. continual claim
pl. 1. cites
S. C. —
Co. Litt.
150. a. b.
S. P.

Fitzh. continual claim
pl. 2. cites
S. C.

(P) Continual Claim.

Who may make it. Person interested, or a Servant.

1. A Dying seised, and descent within a year and day after claim made, takes not away the entry of him that claimed, though there be never so many disseisins, alienations or descents within that time, and though it were not made till many years after the disseisin. Hawk. Co. Litt. 338.

If the disseisee enters within a year and a day before the descent cast, though

there were twenty mean disseisins; yet the entry is not taken away; for there can be no just possession in the heir, if the disseisee has continued the possession by those solemn acts that the law requires, and within the time that the law builds a presumption of a dereliction, if the disseisee neglects his entry. But if the disseisor at common law had kept possession forty years, and the disseisee had entered but half a year before his death, yet in that law, as Littleton remarks, the heir had not gained the right of possession, because no dereliction can be presumed if the disseisee claims within the time prescribed by the law. And if the law cannot presume that the disseisee has deserted the right of possession, it cannot be transferred to the heir of the disseisor; nor ought the lord in such cases, to accept of his services from such heirs. Nay Coke says, that the feoffee of the disseisor that comes in by title after a year and a day was expired, was anciently held to have right of possession, and to put the disseisee to his writ of entry, because they come in by title; and for quiet of purchasers this non-claim for a year and a day was held a dereliction. Gilb. Treat of Ten. 38.

[16]

2. If a man be disseised, and the disseisor dies seised within the year and day next after the disseisin made, whereby the tenements descend to his heir, in this case the entry of the disseisee is taken away; for the year and day which should aid the disseisee in such,

If the disseisor dies seised within a year and day after

the disseisin, and before any entry by the disseisee *this gives a right of possession to the heir, because when the disseisee yields up the possession peace-*

ably, the presumptive right is in the disseisor, for it is to be presumed that the disseisee would return again to his possession, if he were not conscious that his adversary had the right; wherefore there is no time given after such disseisin for the disseisee to assert his right; for it is to be presumed he would do it immediately, if he has the right of possession in him, and the rather, for that men have the quickest sense of injuries immediately after they are committed. So that the giving up the possession tamely, and yielding to the disseisin, makes a strong presumption for the disseisor's right and by consequence the law must take the right of possession to be in the heir of the disseisor, and the lord is bound to accept him as tenant, and to relieve the teneants into his hands. But if the disseisee had re-entered, then he had asserted his own right of possession by such his entry: for *affectio impuniti nomen operi*; for the law cannot suppose the disseisee to have relinquished his right against his own express act to the contrary. And if the disseisee has not deserted his right, the lord ought to attend to the solemn claim made by him, and not relieve the teneants into the hands of the heir of the disseisor; and if he does it is null and void, and cannot give him any right. Gilb. Treat. of Ten. 39, 40.

4. If *tenant for years*, tenant by *statute staple*, merchant or *elegit* be ousted, and he in the reversion disseised, the *lessor*, or he in the *reversion* may enter, to the intent to make his claim, and yet his entry as to take any profits, is not lawful during the term, and in the same manner the lessor, or he in the reversion in that case may enter to avoid a *collateral warranty*, or the lessor in that case may recover in an *assise*, and so (as some have holden) the lessor may enter in case of a lease for life to avoid a descent, or a warranty. Co. Litt. 250. b.

5. If the *father* makes a claim, and the disseisor dies, and then the father dies, his heir may enter; because the descent was cast in the father's time, and the *right of entry*, which the father gained by his claim, shall descend to his heir; but if the father make continual claim, and die, and the son makes no continual claim, and within the year and day after the claim made by the father the disseisor dies, this shall toll the entry of the son; for that the descent was cast in his time, and the claim made by the father shall not avail him that might have claimed himself, and of this opinion was Littleton in our books, where he holds, that no continual claim can avoid a descent, unless it be made by him that has title to enter, and in whose life the dying seised was. Co. Litt. 250. b. ad finem.

6. Continual claim does not only extend to the first disseisor, in whose possession it was made, but to any other disseisor that dies seised within the year and the day after the continual claim made, and whereas our author speaks of a second disseisor, &c. herein is likewise implied, not only *abaters* and *intruders*, or any other *feoffees* or donee immediate or mediate, dying seised within the year and day of such continual claim made. Co. Litt. 255. b.

7. Continual

7. Continual claim made *by a servant for his master* is good, if he enters into a part and claim, &c. or if the *master* say, that he *dares not go* to any part of the land, nor approach nearer than to D. and commands his servant to go to D. and claim, and the servant does so, this is sufficient, though the servant had no fear, for he doth as much as he was commanded to do, and all that his master durst, or ought by the law to do. Hawk. Co. Litt. 340, 341. Litt. S. 433.

8. But if the *master be in health*, [and can, and dares go well to parcel of the land to make his claim]—and *commands his servant to go to the land* and claim, &c. In this case a claim made by the *servant as near as he dares* is void, for he does not do all that is commanded, nor so much as the master durst have done. Hawk. Co. Litt. 341. Litt. S. 435.

9. But if the master *be sick*, or a recluse, so that by reason of his order he can't go, and he command his servant to go and claim for him, and the *servant goes as near as he dares*, by reason of fear, &c. this is sufficient, though the command were to go to the land; and yet regularly, when a servant does less than the command, his act is void; * for where a man is forced to make use of his servant, he is more favoured than one who is able to do his own business; and if the servant do as much as it may be presumed his master would have done himself, it is sufficient, for *impotentia excusat legem*; when a *servant exceeds* his master's command, it is void only so far as he hath exceeded. Hawk. Co. Litt. 341. Litt. S. 434.

* This is as a note added by the serjeant.

10. The *reason why* this time of a year and a day seems to be set by the feudal law is, because the services appointed seem to be annually compleated; and therefore that was the time for the vassal to claim from his lord, and the same time he had to claim from his lord, he had to claim from any disseisor for the uniformity of the law; and that the lord might know who was the person that he might take for his tenant, and that the lord might receive his feudal fruits from the heir, in case the disseisor died. And if the tenant lost the whole feud, in case he did not claim within a year and a day, it is fit he should lose the right of possession, in case he neglects his claim upon the disseisor in the same space that the heir may be in peace, and that the lord may receive him as a tenant. For that was by the ancients thought to be a violent *presumption of dereliction*, both in the one case and the other. But our law, since it gives a distress for all feudal duties, doth not presume the feud derelict, in case feudal services are not paid, since the lord has a power to compel the payment; and therefore the law does not induce any forfeiture in that case. But the law gives the right of possession to the heir, in case the disseisor does not claim within the space mentioned, because there the presumption remains of the dereliction of the disseisor, since the entry or action is the only way that he has to obtain possession. Gilb. Treat. of Ten. 36, 37.

(Q) What sufficient or amounts to a Claim to avoid a Descent.

1. **I**N assise *N. leased to P. for term of life, P. aliened to G. in fee, N. entered for the alienation, and G. re-entered and ousted him, and N. claimed and always was debating, so that G. had no peaceable possession, and G. of such seisin died seised and his heir entered, and N. died, and the heir of N. entered upon the heir of E. and the entry adjudged lawful; by reason of the claim and non peaceable possession of G. Br. Continual Claim, pl. 8. cites 25 Ass. 12.*

Br. Entry
Cong. pl. 78.
cites S. C.—
S. C. cited
Co. Litt.
254. a.

2. It was found by verdict in the county of Dorset before justices of assise, that the plaintiff, who had title of entry after the death of his ancestor, abode in the vill where the tenants were, and by parol claimed the tenements among his neighbours, but for doubt of death he durst not approach the tenements, and brought assise upon this matter as above, and it was awarded that he shall recover, quod nota bene; for this claim is an entry in law. Br. Continual Claim, pl. 9. cites 38 Ass. 23.

3. And see tit. Continual Claim in Littleton, that upon every such claim the party shall have action for the occupation against the occupier, which affirms that this is entry and seisin. Ibid.

4. In assise the tenant pleaded bar by grant of reversion to his father, and the tenant for life attorned and died, and his father entered and died, and he entered as heir and gave colour; the plaintiff replied, that after the grant supposed, his father was seised in fee and died seised, and he entered as heir and was seised, and disseised by the defendant; the tenant rejoined, that after the entry of the father of the plaintiff, the father of the tenant made continual claim, and there it was agreed that this was no plea; for he who makes continual claim, shall do it freshly from year to year; for if he continues by two years after the claim, and dies seised, the claim shall not serve. Br. Continual Claim, pl. 1. cites 9 H. 4. 5.

Litt. S. 414,
415, 416,
and Co.
Litt. 250.
a. b.

5. If disseisee makes continual claim unto the lands, whereof the disseisor or his donee or feoffee is seised, or he in the reversion or remainder makes continual claim upon the alienee of a particular tenant guilty of a forfeiture, before a descent cast, they save their entry thereby notwithstanding the descent. Hawk. Co. Litt. 334.

6. It is to be observed, that the year and the day shall be so accounted, so as the day whereon the claim was made shall be accounted one. As if the claim were made secundo die Martii, that day shall be accounted for one, and then the year must end the 1st day of March, and the day after is the second of March. Co. Litt. 255. a.

Co. Litt.
263. a. says
it is held

7. If a disseisee brings an assise, and the jury find for him, and the justices will be advised till next assise, and in the mean time disseisor dies,

dies, it seems that the *suit* did amount to a continual claim, inas-
much as no default was in him, &c. Litt. S. 442.

for law at
this day that
it shall

amount to a claim, because there was default in him, as Littleton says.

8. If it be *objected* that if the bringing of assise should amount to continual claim, and every continual claim made by the disseisee vests the possession and freehold in him, therefore *if the bringing the assise, &c. should amount to a continual claim, that then the writ should abate.* The answer is, that a continual claim is an entry by construction of law for the advantage of the disseisee, but not for his disadvantage. Co. Litt. 263. a.

[19]

9. In a writ of Entry sur disseisin against one, supposing that he had not entered but by S. who disseised him, the tenant said that S. died seised, and the land descended to him and prayed his age. The plaintiff counterpleaded his age; for that he arraigned an assise against S. who died hanging the assise and he was ousted of his age; for that *the bringing the assise amounted to a claim.* Co. Litt. 263. a.

10. If tenant in dower alien in fee with warranty, and the heir in the reversion bring a writ of entry in *casu proviso*, &c. and hanging the plea the tenant dies, the heir shall not be rebutted or barred by this warranty, for that the præcipe did amount to a continual claim. Co. Litt. 263. a.

11. The entry or continual claim *must pursue the action.* Co. Litt. 263. b.

12. If an *action* to recover lands, of which a fine was levied, be brought and discontinued by the defendant, this (it was said) will not amount to a claim. Vent. 45. Mich. 21 Car. 2. B. R. Anon.

13. Entry on the land by a *cesty que trust*, is not sufficient claim, but it must be by *subpœna*; per Ld. Keeper. Chan. Cases 268. Mich. 27 Car. 2. Clifford v. Ashley.

14. *Entry of issue after discontinuance* is no claim, but it must be by formedon. The statute has taken away the claim at common law sub pede finis. Per Ld. Chancellor. Chan. Case 278. Trin. 28 Car. 2. Salisbury v. Baggot.

15. *There was a court before the house, and at the gate of the house the heir said to the tenant, that he was heir of the house and land which he held, and forbad him to pay more rent to the defendant, and eo instante entered the house.* Adjudged to be a sufficient claim. Skin. 412. pl. 8. Hill. 5 W. & M. in B. R. Anon.

(R) Continual Claim. Within View,

Sufficient in what Cases.

1. **I**N assise it was found that J. was seised and disseised by M. and that J. claimed it, and shewed deed of his right, and would

have entered and could not, nor durst not, and that M. died seised, and his heir entered, upon which J. claimed and shewed the deed, &c. and would have entered, and could not, nor durst not, and so of divers others; and because J. never put his foot to have entered, nor essayed to enter, nor it was not found that there was any doubt of death, therefore by award this was no entry or good continual claim, and therefore the plaintiff, who was in by descent, recovered notwithstanding those claims; for they were nothing worth. Br. Continual Claim, pl. 10. cites 39 Ass. 11.

It seems by the authority of Littleton, that if the disseisee comes as near the land as he dares, &c. and makes his claim, this should be sufficient, albeit he be not within the view. Co. Litt. 254. a.

2. The claim is not good if he does not come near to the land, and that in sight of the land, so that the passers-by may have notice, and then this serves for an entry quod curia concessit; but it is not mentioned if he durst not enter for doubt of corporal ill, as in *Littleton tit. Continual Claim*. Br. Continual Claim, pl. 1. cites 9 H. 4. 5.

[20]

Br. Assise, pl. 59. cites S. C.

3. A man disseised another and continued seisin half a year and died, and the land descended to two, whereof one was an infant, and the disseisee re-entered upon the heirs, and they brought assise, and all the matter was found by verdict at large, and that the disseisee all the life of the disseisor made continual claim, but did not enter for doubt of corporal ill, but approached as near as he durst for doubt, &c. and found that they did not know of any menace to the disseisee in disturbance of the entry, and yet it was awarded that the entry of the disseisee was good, and the plaintiffs shall not take any thing by their writ. Br. Continual Claim, pl. 2. cites 12 H. 4. 19, 20.

4. Continual claim shall not serve without entry, unless it be alleged that the continual claim was made at the land, and that he did not make entry for doubt of death or battery, and this pleaded accordingly, but if he durst enter, he ought to enter, quod nota, and said that he claimed at the land all the life of his father, and that he durst not enter for doubt of battery; Prift, and the others e contra. Br. Continual Claim, pl. 4. cites 14 H. 4. 13.

5. Where a continual claim shall *divest any estate in any other person* in any lands or tenements, there he that makes the claim ought to enter into the land, or some part thereof. But where the claim is *not to divest any estate but to bring him that makes it into actual possession*, there a claim within the view suffices, as upon a descent the heir having the freehold in law may claim land within the view to bring himself into actual possession. Co. Litt. 254. b.

Litt. S. 418, 419. & Co. Litt. 253. b. 254. a.— If a man cannot enter for fear of outrage, yet it is good; so

6. If he who has a title to enter, dares not enter for fear of battery, maiming, or death, if he goes as near as he dares, and claims the land, he has presently by his claim such a seisin as if he had entered in deed, though he never had any seisin before. But his fear must concern his person; for the fear of his burning his houses, or loss of his goods is not sufficient. The fear of imprisonment or mayhem is not only sufficient to make such a claim equivalent to an actual entry, but will also avoid a deed executed by a man under such

such fear; but the fear of battery is not sufficient in the latter case, but in the first it is, for the re-continuance of an ancient right is favoured in law. In pleading *some just cause of fear* must be shewn, and it must be no vain fear; but in a special verdict, if the jury find that the disseisee did not enter for fear of corporal hurt, this is sufficient, and it shall be intended that they had evidence to prove the same. Hawk. Co. Litt. 337, 338.

also is a claim with- in view good, when a man fears to enter; for in both cases a man ought to take pos-

session where he can, because it is the change of possession makes the notoriety in both cases; but if the disseisor menace war to the person that has right, then the law, which doth not compel to impossibilities, allows him to make his claim as near the land as he durst come. Gilb. Treat. of Ten. 36.

(S) Pleadings of Continual Claim.

1. **ASSISE**; descent was alleged, and the plaintiff alleged continual claim, and the issue was taken, that he did not make the claim in such place so near as he might see the land; and it was admitted, and yet it seems that it is negative pregnant. Br. Negativa, &c. pl. 10. cites 9 H. 4. 45.

2. In trespass, the defendant pleaded dying seised and descent, the plaintiff said, that he was seised, and disseised by him who died seised, and he made continual claim, and the other said that he died peaceably seised; and no plea without traversing the continual claim; for he may die peaceably seised notwithstanding the continual claim. Br. Traverse per, &c. pl. 289. cites 14 H. 4. 36.

continual claim shall avoid the dying seised. Br. Issues joins, pl. 56. cites S. C.

[21]
Br. Contin-
ual Claim,
pl. 12. cites
S. C.—
S. P. And
yet the
S. C.

3. Forcible entry by E. against K. priores of D. the defendant said, that M. her predecessor was seised, till by J. disseised, who infeoffed A. que estate the plaintiff has, and the predecessor died, and the defendant entered, &c. The plaintiff replied, that A. was seised and died seised, and the plaintiff entered as heir and was seised, till the defendant entered with force. The defendant rejoined, that her predecessor made continual claim all her life. The plaintiff surrejoined, that before M. any thing had, the said J. was seised in fee, till disseised by R. who infeoffed M. the predecessor, and J. re-entered and infeoffed the said A. who was seised and died seised as above, and a good plea to avoid the continual claim as above. Br. Confels and Avoid, pl. 55. cites 22 H. 6. 7.

For more of Descent in general, see **Copplebold, Forme-
don, Gavelkind, Heir, Uses**, and other proper Titles.

Detinue.

(A). For *what Things* it lies.

[1. **D**Etinue lies for *Money in a bag*. . 7 H. 4. 13.]

[2. Detinue lies for a bag sealed and 100*l.* in eadem бага contenta. 18 H. 6. 20.]

F. N. B. [3. So detinue lies for a bag, and 100l. in eadem бага contenta,
138. (A) without saying the bag was sealed, for the property is altered. 18
is the new H. 6. 20.]
notes there
(C. c) cites S. C. and 29 E. 3. 20. accordingly.

Detinæ lies not for money out of a bag or chest; for it cannot be known from other money. Co. Litt. 236. b.

[5. If a man lends a sum of *money* to another, *detinue lies not* for it, *but debt*, 18 H. 6. 20.]

[22] [6. Detinue lies of a piece of gold of the price of 22 s. though it does not lie of 22 s. in money, for here he demands the particular piece. P. 16 ja. between Malon and Malgrove; this being moved in arrest of judgment.]

Ca. Litt. 286. b. 8. P. . [7. Detinue lies of *charters concerning land*. 17 E. 3. 45.]
if he knows the certainty of them and what land they concern, or if they are in a bag sealed, or chest locked, though he does not know the certainty of them. Ca. Litt. 286. b.

S. P. Br. 8. The heir may have detinue of *rationabili parte bonorum*, though he never had possession or property before. Br. Detinue de biens, pl. 30. cites 39 E. 3. 6.

9, *Detinue lies by the beir of beir-loomes* or principals of his ancestor, viz. the best of every sort of goods. Br. Customs, pl. 27. cites 39 E. 3. 6.

10. In *replevin* the plaintiff got the beasts of the defendant in *Withernam*, by which he was compelled upon issue to gage thereof deliverance, and writ issued to the sheriff for him to make livery of the *Withernam*, and the sheriff returned *Averia elongata, &c.* by which issued *Withernam* for the defendant of the beasts of the plaintiff, and the sheriff returned *nil*, by which issued three *capias*,
and

and after exigent, and by the reporter the defendant may have writ of detinue of his beasts; quære inde; for it seems that the delivery in *Withernam*, by authority of the law, is a good bar in detinue. Br. Detinue de biens, pl. 18. cites 11 H. 4. 10.

11. Debt upon arrears of account, where the case was that the plaintiff leased to the defendant an hostry with store and stuff, and at the end of the term counted that diverse things were wasted and lost; and per Newton, debt upon the lease lies of the rent, and detinue of the goods, though they are wasted or lost, by which the defendant was admitted to his law. Br. Detinue de biens, pl. 3. cites 20 H. 6. 16.

12. It seems that where a man finds my goods, and detests himself of them before that action be brought, then action of detinue does not lie. Br. Detinue de biens, pl. 33. cites 39 H. 6. 2.

13. Detinue of certain quarters of barley, and did not count in sacks or otherwise, and exception taken, and it was admitted for good, and so it is often in use. Br. Detinue de biens, pl. 51. cites 6 E. 4. 11.

14. If I bail goods to W. and he loses them, and B. finds them, he is chargeable to me by action of detinue. Br. Detinue de biens, pl. 40. cites 12 E. 4. 8.

15. But if W. recovers them against B. he is discharged against me. Ibid.

16. If the obligee be outlawed, and the king brings detinue of the obligation, if this matter be confessed, the king shall have judgment to recover the obligation, per Brian. Br. Detinue de biens, pl. 52. cites 4 H. 7. 17.

17. Detinue does not lie of hawks, hounds, apes, or popinjays, or such like, which are things of pleasure, and are made tame, and were *feræ naturæ*; yet trespass lies of them well, and the plaintiff shall recover damages of the taking, per Brudnell & non negatur. Br. Detinue de biens, pl. 44. cites 12 H. 8. 5.

Br. Pertinuity, pl. 44. cites 12 H. 8. 4. C. — Br. Repvin. pl. 4. cit 3. C.

18. A writ of detinue lies in case where a man delivered goods or chattels unto another to keep, and afterwards he will not deliver them back again; then he shall have an action of detinue of those goods and chattels; and so if a man deliver goods or money put up in bags, or in a chest, or in a cupboard, unto another to keep, and he will not re-deliver the goods or the money in the bags; he to whom they should be delivered shall have a writ of detinue for those goods, &c. But if a man deliver money, not in any bag or chest, to re-deliver back, or to deliver over unto a stranger; now he to whom the money shall be delivered, shall not have an action of detinue for the money, but a writ of account; because detinue ought to be of a thing which is certain; as of money in bags, or of a horse, or of 100 cows, or such certain things. F. N. B. 138. (A).

19. If obligor pay the money at the day and place, though the obligee will not deliver the bond, yet the obligor shan't have detinue for it. Le. 238. in pl. 318. cited to have been so held Pasch. 2^d Eliz. B. R. in case of Cook v. Huet,

23

Cro. E. 457.
(bis) pl. 2.
Pach. 38
Eliz. B. R.
the S. C.
adjudged
without ar-
gument, for the defendant; for detinue ought always to be of things certain and which may be known to be delivered.

20. A recovery and judgment was in a bafe court in a plaint in detinue of 4*l.* of money, the judgment was reverfed, becaufe that action, nor a replevin, doth not lie of money, but debt or account. Mo. 394. pl. 510. Hill. 37 Eliz. B. R. Banks v. Whetstone.

21. Detinue lies for goods, delivered on a *general bailment and fter*, and it is no plea to fay he was robbed by J. S. for he has his remedy over by trespafs or appeal to have them again. Cro. E. 85. pl. 4. Pach. 43 Eliz. B. R. Southcott v. Bennet.

22. Detinue lies not for *corn out of a fack*; for it cannot be known from other corn. Co. Litt. 286. b.

23. Error was brought of a judgment in detinue, becaufe the wrt fuppofes a detainer *de una domo vocat' a bee-houfe*, which cannot be, that a detinue fhould lie of a houfe. The court held this to be error, and the judgment was reverfed. Cro. J. 39. pl. 1. Mich. 2 Jac. B. R. Copledike v. Copledike.

2 Bull.
308. S. P.
by Doder-
idge J.

24. A detinue *implies a property in the plaintiff*; per Doderidge J. Roll. Rep. 128. Hill. 12 Jac. B. R. cites 6 H. 7. 9. F. N. B. 13. Also *the thing detained must be certain*, whereof a property may be known whereof a detinue lies. The ground of a detinue is to recover the fame thing in individuo if it may be had, and if not, then damages for them, and cites 17 E. 3. 45. 20 E. 3. Office de Court. 18 E. 4. 23. 1 E. 3. 5. 1 R. 3. 5.

25. By the *act of navigation* 12 Car. 2. cap. 18. certain goods are prohibited to be imported here under pain of forfeiting them, one part to the king, another to him or them that will inform, feize, or fue for the fame; and it was adjudged in this cafe, that the fubject may bring detinue for fuch goods, as the lord may have replevin for the goods of his villien diftrained; for the bringing an action vefts a property in the plaintiff. 1 Salk. 223. Pach. 8 W. 3. B. R. Roberts v. Wetherall.

So the
goods we
delivered,
the carrier
by one the
fole them,

26. If a *common carrier carries goods delivered to him*, he may detain them till he is paid for the carriage. Ruled by Holt Ch. J. at Guildhall, May 12. 1 Ann. 1702. 2 Ld. Raym. Rep. 752. Skinner v. Uphaw. and the rht owner finding the goods in the carrier's poffeffion demanded them of him, and the carrier refufed to deliver them without being paid for the carriage, and fuch refufal * was held juftifiable for when they were brought to him, he was obliged to receive and carry them. Per Holt Ch. J. 2 Ld. Raym. Rep. 867. Pach. 2 Ann. — But Powell J. faid, that a carrier cannot dean for his carriage. Ibid. But the Reporter fays, aote, the contrary has always been held by Holt Ch. J. at Guildhall.

* [24

27. Detinue lies of a *box of writings*, and if any of them concern lands it will be prudent to name it; for that *things which it contains be certain enough*; and if any new action be brought the defendant fhall fay that a former action was brought for the fame thing by the name of fo many bundles, &c. Per Holt Ch. J. Mod. 87. Mich. 2 Ann. B. R. in cafe of the Q. v. Brown,

(B) The Gift of the Action.

[1. A Man may have a *general detinue* against a man that finds his goods. 7 H. 6. 22.]

[2. If A. by his deed acknowledges himself to have sold to B. 10 cords of hop-poles for 14s. per cord, which he is to deliver to B. at his garden, when B. shall send his servant to cord them. Quære if B. may have an action of debt in the detinet to render 10 cords of hop-poles upon this deed, or shall be put upon an action of covenant. Hill. 11 Car. B. R. between Couchman and Horden, per Curiam, dubitatur.]

3. The gift of the action of detinue is upon the detainer; as if goods are delivered to the baron and feme the detinue shall be only against the baron; because the feme had no possession, and therefore she cannot detain them. Per Doderidge J. Roll. Rep. 128. B. R. cites 38 E. 3 1.

2. Bullt. 308. S. P. by Doderidge J. and cites S. C.

4. A man took distress damage feasant, and the owner immediately tendered to him 7 d. and averred that the damages did not amount to 6 d. and the other refused and imparked them, yet replevin lies, and the issue was taken upon the tender before the imparking; but per Horton he ought to have detinue; for the taking before the tender was lawful, therefore replevin does not lie after the tender; for replevin supposes the tender to be tortious, where it is confessed to be lawful, therefore he ought to have detinue, quære. Br. Detinue de biens, pl. 21. cites 12 H. 4.

Br. Replevin pl. 27. cites 12 H. 4-23. S. C.

5. Goods were sold and delivered on condition, that if the bargainer paid such a sum on the 17th of May following then the bargain and sale to be void. The money was paid at the day. After judgment for the plaintiff (the bargainer) it was assigned for error that here was not any delivery by bailment, but by bargain and sale, but the court held it well enough; for the condition being performed, he ought to have them again, and then the detaining them is a tort. Cro. E. 866, 867. pl. 49. Mich. 43 and 44 Eliz. in Com. Scacc. Bateman v. Elman.

6. Detinue lies where a man comes to goods either by delivery or finding. Co. Litt. 486. b.

* F. N. B. 138. (E) S. P. as to goods found.

(B. 2) In what Cases Detinue or Trover lies. [25]

1. WHERE the bailment is to the testator by indenture, there covenant may lie against the executors but not detinue, unless by reason of the possession. Br. Detinue de biens, pl. 19. cites 11 H. 4. 46.

2. If a man bails 40 L. to W. N. to rebail quando, &c. Detinue lies and not account. Br. Detinue de biens. pl. 41. cites 4 H. 6. 2. per Marten.

3. Contra,

3. *Contra*, if it was delivered to render account; note the diversity, Ibid.

4. *He who seizes goods for the king as waif, &c. and is not officer accountable to the king, and after devests himself of the possession thereof*, now action of detinue does not lie; *contra* upon a trover, per Prisot, Ch. J. but Danby J. and Littleton were against Prisot, and that he is chargeable to the king by the seizure. Br. Detinue de biens, pl. 33. cites 39 H. 6. 2.

Br. Detinue
de biens
pl. 53. cites
S. C.

5. If a man *takes my goods as trespassor*, yet I have *replevin*; for this is of the property which was in me at the time of the taking, but *detinue* does not lie; for this is of the property which is in me at the time of the action prosecuted, per Brian. Br. Detinue de biens, pl. 36. cites 6 H. 7. 9.

6. If a man *bails to me his goods* I am chargeable to him by action of detinue, though *I bail them over*. Per Fitzh. and Shelley J. Br. Detinue, pl. 1. cites 27 H. 8. 33.

7. *But if I find goods, and am out of possession after lawfully*, then I shall not be charged to the action of detinue. Ibid.

* S. P. Br.
traverse
per fans,
pl. 7. cites
37 H. 8. 29.

8. And per Fitzherbert, if he who finds them *delivers them over before action brought*, then he is excused in action of detinue, *quare inde*; for per Shelly and others, 32 H. 8. if he meddles with them he shall be thereof charged, though he delivers them over, and per Fitzherbert, * *bailment is traversable* in some case, but the *trover* not; *contra* Shelley. Br. Detinue, pl. 1. cites 27 H. 8. 33.

9. Either an action upon the case of trover and conversion, or any action of detinue at the *election* of the plaintiff may be brought *for goods detained* from him. (22 Car. 1. B. R.) for it is but justice that the party should recover his goods detained in specie, if they may be had, or else damages sustained for detaining them, at his election; for the defendant is not injured thereby. L. P. R. 17.

10. An action of *trover* and conversion is in its nature but an action upon the case *to recover damages*, (Mich. 22 Car. 1. B. R.) and is not brought to recover the goods in specie. *But* in a *detinue* you recover *the things detained* in specie, or *the value* of them. L. P. R. 17.

(C) *Who shall have it.*

[And against whom.]

C. may
have deti-
nue, though
it be of
another's bailment, quod nota. Br. Detinue de biens, pl. 32. cites 39 E. 3. 17.—Br. Charters
de terre, &c. pl. 38. cites S. C. and S. P. accordingly.

[1.] If a man *delivers goods to L. to deliver to C. C. may have*
detinue, for the property is in him. 9 H. 6. 58. 60. * 39
E. 3. 7. [17.] adjudged.]

[26] [2. If a man *delivers goods to B. and after grants them to*
D. he shall not have detinue after the grant. 9 H. 6. 64.]

[3. *But*

[3. But the *grantee* shall have detinue. 9 H. 6. 64.]

[4. If my *bailee* delivers them over to another I may have detinue against the second *bailee*. 11 H. 4. 46. b.]

[5. So if he delivers them over to him that has right thereto, yet he is chargeable to me. 9 H. 6. 58.]

[6. If the *bailee* delivers the thing to another to re-deliver, he may have detinue against him. 12 H. 4. 18. b.]

If *bailee* bails the goods over

he may have writ of detinue, though he be not the owner. Per Hank. Br. Detinue de biens, pl. 20 cites 12 H. 4. 18.

[7. If my *bailee* delivers it again to me, he is not chargeable to others who have a right to the thing. 7 H. 6. 22.]

Fol. 607.

[8. If I deliver a deed to A. to which B. hath right, and A. dies, and his executor takes the deed, he is not chargeable in detinue * to me, but only to B. that hath the right because he comes to it by the law. 9 H. 6. 58.]

Br. Charters de terre pl. 72. cites S. C.—Br.

Garnishe, &c. pl. 1. cites 3 H. 6. 35. S. P.

* This in Roll is misprinted (al. A)

[9. If I deliver a deed to A. to re-deliver, and he loses it, and B. finds it and delivers it to C. who has right thereto, he is not chargeable afterwards to me in detinue because he is not privy to my delivery. 9 H. 6. 58.]

Br. Charters de terre pl. 72. cites S. C.—Br. Garnishe, &c.

pl. 1. S. P. cites 3 H. 6. 35.

[10. But if I find a thing, and another recovers it from me, yet any other that hath the right may have detinue against me also. 7 Hen. 6. 22.]

11. After divorce made betwixt husband and wife, the wife shall have a writ of detinue for the goods given with her in frankmarriage. F. N. B. 139. (A) cites Mich. 35 E. 1.

12. If the father bails charters to you, and after you are infeoffed of the land, yet the heir shall have the charters; for they belong to him to have his warranty over; per Knivet quod non negatur. Br. Charters de terre, pl. 38. cites 39 E. 3. 17.

13. Note, that bailment of a deed by a *feme covert* is good if the baron dies, and she shall have writ of detinue, for though the bailment be void between the baron and the bailee, it is good between the feme and the bailee, if the baron dies and the feme survives, quod nota. Br. Bailment, pl. 1. cites 3 H. 6. 50.

Br. detinue de biens, pl. 5. cites S. C.—Baron alone bails the charters of the feme;

he alone shall have detinue. But if the *bailee* loses them, the baron and feme ought to join in action on the case for damages; per Coke Ch. J. Roll. Rep. 129. B. R. cites 38 H. 6. 25.

14. Where a lease is made for life by deed, the remainder over in fee, and the tenant for life dies, he in remainder shall have action of detinue of this deed, for it belongs to him. Br. Charters de terre, pl. 6. cites 9 H. 6. 54.

15. Note by the best opinion, that if a man bails a deed to another to re-bail to him, or to his heirs, and dies, the heir shall not have action upon this special bailment, if he does not make to himself title to the land. Br. Bailment, pl. 2. cites 9 H. 6. 58.

Br. detinue de biens, pl. 7. cites S. C.

16. Detinue

16. Detinue of a writing against executors, and declared, that ~~the father bailed to the testator, in which was contained 30 acres of land, * which he had in R. and elsewhere in the county of Middlesex, to re-bail to him and his heirs, and that the testator made the defendant executor and died, and the father died, and he is heir to his father, &c.~~ Fortescue demanded judgment of the count; for this word *elsewhere* implies no certainty where the land lies, and it may be when he has recovered the deed, at another time he shall charge the defendant again by land in another vill by this word (*elsewhere*) because where a man demands by privity of bailment, there he need not shew the certainty of the land, and for this also, that land here is not in demand, because the declaration was insufficient, and the defendant before this had pleaded in abatement of the writ, therefore the court awarded. But per Markham, if he demands as heir, he shall shew where all the land lies, or otherwise he shall not intitle himself to the deed. Br. Detinue de biens, pl. 23. cites 19 H. 6. 10.

17. Where I bail a thing to B. to deliver to C. there C. shall have action, though the charter, or thing does not belong to him. Br. Charters de terre, pl. 31. cites 19 H. 6. 41.

18. Detinue of a charter; Markham said, the plaintiff has not intituled himself to the land in the charter; per Newton, if my father was seised in fee, and bailed the charters to you, to-rebail to him or his heirs, and after the father aliens the land and dies, yet his heir shall have the deed; the reason seems to be inasmuch as the heir may *disavain the first warranty, if the feoffee be impleaded and vouches the heir*. Br. Charters de terre, pl. 32. cites 19 H. 6. 65.

19. In trespass, per *Prisot*, if a man bails goods to bail over to C. there C. has no property by it, and yet he may have action; and so see action without property; for by him the bailor may have action of detinue if he does not deliver the goods to C. and C. may have action likewise, for if the one or the other recovers, the other is barred of action; for a recovery makes an end of all; but per *Laioun serjeant*, he has property by the bailment to C. *quare*, for a gift to me by livery made to J. S. is good to me, if I agree to it. Br. Detinue de biens, pl. 34. cites 39 H. 6. 44.

20. Detinue; a man gave in tail by deed, and in conservation of his estate gave several other deeds of the same land to him, and after the tenant in tail infeoffed W. B. of this land, and bailed all the deeds to the defendant, to keep to the use of W. B. which W. B. and the issue in tail, brought several writs of detinue of them against the defendant. And by all the justices, * the issue in tail shall have the deed of the gift in tail; and per Choke J. the issue shall have the deed of the gift in tail, but not the other deeds; for they are chattles, and the donee may give them. Br. Charters de terre, pl. 36. cites 9 E. 4. 52.

21. But if the father dies possessed of them, the heir shall have them, and not the executors. *Ibid*.

22. But if a man leases to another for years, and after confirms or releases to him in tail, and all by deed, if he gives the deed of the lease, the issue in tail may recover it by action of detinue; for without the deed of lease, the release or confirmation cannot enure, and also

* P. N. B.
138, (H)
and the new
English
edition cites
18 E. 4. 15.
44 E. 3. 1.
10 E. 4. 9.

also he shall have release made to his father after the gift; for this perfects his estate. Br. Charters de terre, pl. 36. cites 9 E. 4. 52.
23. But if I am seised of certain land, and have several deeds thereof, and sell the land, the feoffee or vendee shall not have the charters if I do not give them to him. Ibid.

24. In detinue of charters the plaintiff counted that F. was seised in fee, and infeoffed him of the land, to which &c. and after the feoffor lost the charters, and they came to the defendant et non allocatur; for he shall not have the charters though he has the land, unless the feoffor gives them to him; for they shall remain to the feoffor to vouch to have the warranty paramount, per Cur. Br. Detinue de biens, [28] pl. 41. cites 18 E. 4. 14.

25. Where an abbot and convent leases to E. for life by deed, and the lessee bails the deed to B. the abbot dies, and E. grants his interest to B. he shall have the deed of the abbot and convent, for this makes the estate, and is the original. Br. Charters de terre, pl. 44. cites 21 H. 7. 35.

For where A. grants rent to B. and B. grants it over to C. there C. shall have the first Deed. Ibid.

26. In detinue brought of an obligation the case was, that a co-executor gives the bond to a stranger in payment of his own debt, and dies. Detinue lies not for the survivor. Adjudged. Mo. 422. pl. 589. Mich. 37 & 38 Eliz. Kelsick v. Nicholson.

Oro. E. 478a pl. 8. S. C. the court seemed to be divided. — Ibid.

496. pl. 15. S. C. adjudged by three justices; but Fenner contra.

27. If return irreplevisable be granted, the owner of the cattle, or other goods distrained, may come to the defendant and offer the arrearages, &c. and if the defendant refuse to deliver the distress, the plaintiff may have an action of detinue, and by that means recover them, for they are in nature of a gage. 2 Inst. 341.

2 Inst. 107. S. P. —

28. If a man gives lands in tail by a deed indented, and the donee dies without heir, the donor shall have a writ of detinue for that part of the deed indented which the donee had. F. N. B. 138. (F.)

The new English edition cites 18 l. 3. 6 H. 7. 3.

detinue 48. 31 H. 6. 13.

29. And so if lands be given to two men, and the heirs of one of them; if the tenant for life dies, he who has the fee shall have a writ of detinue for that deed. F. N. B. 138. (F.)

(D) Against Whom.

[1.] If the bailor of a thing dies, detinue lies against his executors if they take it. 43 E. 3. 29. 11 H. 4. 45. b.]

Detinue does not lie against exe-

cutors unless by reason of the possession. Br. Detinue de biens, pl. 19. cites 11 H. 4. 46.

And if there are executors and the one has the possession, action lies against him only. Ibid.

But where the bailment is to the lessor by indenture, there covenant may lie against the executors, but not detinue, unless by reason of the possession, per Thirne & Mill, contra Hank, and that he shall count against all as executors. Ibid.

[2. So if he *dies intestate*, and a *stranger takes it*, detinue lies against him, or any other to whom it comes. 43 E. 3. 29. 11 H. 4. 46. b.]

[3. So it seems *during the life of the bailee* detinue lies against any other to whom it comes. 43 Ed. 3. 29. contra.]

[4. But if the *bailee of a thing by indenture burns it, and dies*, his *executor shall not* be charged in a detinue, because he shall not be charged without a *possession in him*, for the action dies with the person. 11 H. 4. 46. b.]

[29]

[5. If a *bailee by indenture delivers the goods to B. and B. delivers them back to the bailee, to re-deliver when he is requested, and after recovers in detinue against the bailee, yet the first bailor may also charge him in detinue*, for by his own *act* he hath charged himself to both. 3 H. 6. 44.]

6. If writings are *bailed to a feme sole, and she takes baron*, the action is well brought against both, and shall not be compelled to bring it against the baron alone. Br. Charters de terre, pl. 38. cites 39 E. 3. 17.

Br. Moigne
pl. 3. cites
S. C.

7. Detinue shall not be brought *against an abbot and monk, but against the monk only*, quod nota ibidem. Br. Detinue de biens, pl. 15. cites 2 H. 4. 21.

(D. 2) Writ and Process.

1. **I**N detinue of a bag of charters, if the defendant be *returned nihil*, the plaintiff may have *capias*, per Mowbray J. because the bag is only a chattle; but Belk. contra; and then Ca. Sa. lies for execution of the damages in it, *quære*. Br. Charters de terre, pl. 12. cites 40 E. 3. 25.

2. In writ of a *chest with charters* lies process by *capias*; *contra in writ of charters special* per Thorp, quod Finch. concessit. Br. Charters de terre, pl. 13. cites 41 E. 3. 2.

3. Detinue of a *box with charters*, the sheriff *returned nihil*, and the plaintiff prayed *capias*, and could not have it; *contra* 14 H. 6. 1. For the box is only a chattle, but in *detinue of charters special*, there *capias* does not lie. Br. Charters de terre, pl. 14. cites 42 E. 3. 13.

Br. brief,
pl. 236.
cites S. C.

4. *Where it appears by the writ, or by the declaration in writ of detinue of charters, that it is brought of a chest of charters inclosed, and of one charter special*, the writ shall abate; for of the one lies *distress infinite*, and of the other lies *capias and exigent*, per Palton J. clearly; *quære*, because this is permitted elsewhere. Br. Charters de terre, pl. 41. cites 14 H. 6. 1.

If detinue
be brought
of a chest
inclosed with
charters,
there, be-

5. An action of detinue of *charters sounds in realty*; for therein *summons and severance lies*. And for detinue of *goods a capias* lies, but for *charters in especial a capias* does not lie. Co. Litt. 286. b.

because the court cannot be apprized by the writ, whether they concern the realty or not, process shall be made by *capias*, &c. but when the party appears, and counts, whereby it appears to the

the court that the charters do concern the realty, then he shall be permitted to appear by attorney, &c. F. N. B. 138. (A) in the new notes there (c) cites 29 E. 3. 19. 7 H. 4. a. and 22 H. 6. 42. accordant, with this diversity.

6. This writ is *vicentiel*, and shall be sued before the sheriff in the county if the plaintiff please, or he may sue it in C. B. F. N. B. 138. (A).

7. [But] if a man sues in any court a plaint of detinue for any charters which touch and concern freehold, unless it be in C. B. by the king's writ, the defendant may sue a prohibition to prohibit him, &c. and to surcease, &c. F. N. B. 138. (C).

8. The proofs in detinue is *summons*, *attachment*, and *distress*. F. N. B. 139. (A).

9. The plea may be removed by *Pone* out of the county at the plaintiff's suit, without cause shewed in the writ; and at the suit of the defendant he ought to shew cause in the *Pone*; and this clause shall be in the end of the writ, fiat executio istius brevis, si causa sit vera, aliter non, &c. F. N. B. 138. (D).

(D. 3) Abatement of writ.

[30]

1. I N detinue the writ was *de uno scripto obligatorio de debito*, and the count was of a writing of annuity, and yet was awarded good. Thel. Dig. 84. Lib. 9. cap. 5. S. 19. cites Pasch. 15 E. 3. Brief 682. and 29 E. 3. Variance 68. agreeing.

2. In detinue the writ was *de una charta*, and the count was of a confirmation made to his ancestor with warranty, and held good, Thel. Dig. 84. Lib. 9. cap. 5. S. 21. cites Pasch. 19 E. 3. Detinue 49.

3. In a writ of detinue of a box with charters, the defendant came in by *exigent*, and by the count it was shewed that a charter in special touching frank-tenement was contained in the box. Upon which it was held by Rolf that the writ should abate, because it appeared by the count that *exigent* did not lie in this action, but he pleaded over. Thel. Dig. 84. Lib. 9. cap. 5. S. 35. cites Hill. 8 H. 6. 31.

4. In detinue, death of the defendant after garnishment shall abate the writ; for he is party to the original. Br. Detinue de biens, pl. 55. cites 9 H. 6. 36.

5. *Contra* of the death of the garnishee. Ibid.

6. It was held in detinue of charters, that if it appears by the count that one of the charters does not belong to the plaintiff, all the writ shall abate. Thel. Dig. 237. Lib. 16. cap. 10. f. 47. cites 9 H. 6. 51. Quære.

7. In detinue of charters, by one if it appears by the count that one of the charters concerns the inheritance of his feme who is not nam'd, the writ shall not abate but only for this charter; by the opinion of the court. Quære, for this exception goes only to the writ, but if it had been to the action it had been clear. Thel. Dig. 238. Lib. 16. cap. 10. 50. cites 38 H. 6. 29.

(D. 4) Count. In what cases a request must be laid.

1. **D**ETINUE of a bailment of a bag of writings which the father of the plaintiff bailed to the defendant to bail to the plaintiff, and lay well though it be of another's bailment. Br. Charters de terre, pl. 38. cites 39. E. 3. 17.

2. See 8 H. 6. 30. If one brings detinue of a chest with charters, he ought to count that the chest was locked, for otherwise he shall have a general writ of charters. F. N. B. 138. (A) in the new notes there (c) cites 39 E. 3. 7. contra 14 H. 4. 30. and then if it be not a chest locked he ought to shew what charter specially. 11 H. 6. 9. 49. 14 H. 6. 4.

3. The plaintiff counted of a box and certain charters and muniments, and declared but of one charter certain, and did not count that the box was sealed or locked, judgment of the count, and yet the defendant was awarded to answer. Br. charters de terre, pl. 21. cites 14 H. 4. 23. 24. 27. and 21 H. 6. 1.

4. In detinue of charters the plaintiff counted that they were delivered to Sir H. N. for safe keeping, and that after his death the same charter came to the hands of the defendant, and did not shew how, whether by bailment, trover, as executor, or otherwise. And the opinion of the court was, that the count is good; and so it seems that he is charged tenant by the possession. Br. Charters de terre, pl. 22. cites 9 H. 5. 14.

5. Where lease is made for life by deed, the remainder over in fee, and the tenant for life dies he in remainder shall have action of detinue of this deed, because it belongs to him. Br. Charters de terre, pl. 6. cites 9 H. 6. 54.

6. But if one had released by deed to the tenant for life only, this release does not belong to him in remainder, and he shall not have thereof action; but if he demands both by one and the same writ, and counts accordingly, yet the writ lies for the one, and not for the other, by the best opinion; for it may lie in parcel, and in parcel not. Ibid.

7. In detinue of a chest open with charters in it, the plaintiff declares of two charters in special, and of a chest and other charters in general, and does not shew all in certain of each charter; because it is a chest open the count shall abate; for he ought to shew what charters the others are per Markham J. quod fuit concessum per curiam, except Paston, and yet he was in a contrary opinion the same year. Br. Charters de terre, pl. 42. cites 14 H. 6. 4.

8. And the prothonotaries said, that if he counts of a chest sealed with certain charters, and of two charters in special concerning inheritance, the writ shall abate. And so note if he counts of a chest sealed, of charters he need not count of any charter in special.

9. And at another day Paston J. came and said, that the other day they denied to him the law, and vouched books how it was awarded

awarded a good count to count of a chest sealed with certain charters, and of one charter special, and the justices did not deny him. Br. Charters de terre, pl. 42. cites 14 H. 6. 4.

10. Detinue *Quod reddat bona & catalla*, and counted of three tallies, each of 10 l. and yet the writ awarded good; contra it seems if he demands three obligations, there the writ shall be special. Br. Detinue de biens, pl. 24. cites 21 H. 6. 29.

F. N. B. 138. (B) in the new notes there (a) cites 9. C.

11. Detinue *Quod reddat bona & catalla sua* and counted of three tallies each of 10 l. Yelverton prayed judgment of the writ; for it should be quod reddat three tallies each of 10 l. & non allocatur; and the writ awarded good; and yet it was not denied but that if he had demanded three obligations, the writ should have been special, and not bona & cattalla. Br. Faux Latin. pl. 36. cites 22 H. 6. 29. 30.

12. In detinue the plaintiff counted that he detained a charter by which three gave to him in tail all lands and tenements which they had in D. jointly with J. A. and did not shew if J. A. then was alive or not; for if another has title as well as the plaintiff, he shall not have action alone. Br. Charters de terre, pl. 9. cites 33 H. 6. 26.

13. Count in detinue *per inventionem* is a new use; for the ancient use is quod deven. ad manus, &c. without more. Br. Detinue de biens, pl. 10. cites 33 H. 6. 27. per Littleton,

Br. Charters de terre, pl. 9. cites 33 H. 6. 26. 9. C.

14. Detinue by the heir of the feme against the baron, who cannot be tenant by the curtesy, and the plaintiff conveyed to himself title as he ought, and that the feme is dead without issue, and that he is heir, and shewed how, and that the evidences came to the hands of the defendant, by reason of the marriage, &c. and that the defendant, though often required, has not restored them to the plaintiff; and per Prisot and the best opinion, the count is not good because he did not allege a request after the death of the wife, for before the baron had good cause to retain them. Br. Count, pl. 16. cites 33 H. 6. 29.

15. So in detinue against executors of a bailment to the testator. Ibid.

16. So of him in remainder after the death of the tenant in tail without issue, request shall be alleged after; quære. Ibid.

[32]

17. If a man has a manor and charters thereof, and gives the manor in tail, the donee shall not have the charters, if he does not give them to him; for the donor shall retain them to have the voucher paramount, therefore it is sufficient for the plaintiff to say that he was seised of the manor, &c. and so demand the charters, per Moyle, to which Choke agreed. But per Danby and Littleton, it suffices against a stranger to say as above, but not against the donor. Br. Charters de terre, pl. 56. cites 7. E. 4. 26.

18. In detinue of a chest with charters sealed, the defendant said, that he pledged the box sealed with charters to him for 100s. to him lent, and he is ready to deliver it upon re payment of the 100s. absque hoc that he detained, &c. and a good plea; and yet the defendant might have waged his law thereof when he does not count

of a charter special. Br. Charters de terre, pl. 62. cites 22 E. 4-7.

19. Detinue *de bonis & catallis*, and counted of a chest of charters, and therefore ill; for there is a special writ thereof given quod reddat cistam cum chartis, &c. For by gift de bonis & catallis charters do not pass. Br. Charters de terre, pl. 70. cites 22 E. 4-12.

20. In detinue of charters concerning the inheritance of land it is good policy, if possibly he can, to declare of one charter in special, and then the defendant shall not wage his law. Co. Litt. 286. b.

(D. 5) Pleadings.

1. WRIT of detinue was *de charta*, and the declaration was of a confirmation. Br. General Brief, pl. 22. cites P. 19 E. 3. 5 E. 3. 209. and Fitzh. Detinue 49.

2. And detinue of charters by the heir may be general in the writ without naming him heir, but in the declaration he shall say heir, &c. Ibid. cites Fitzh. Detinue, 54.

Br. General issue, pl. 84. cites 21 E. 3. 30. thus, viz. detinue of a writing of 20 l. &c. the defendant said, that a writing of 30 l. was delivered to him absque hoc that any writing of 20 l. was delivered to him, and a good plea, per Cur. for doubt of the double charge, quod mirum for 20 l. and 30 l. cannot be taken to be the same.

3. Detinue of a writing of 100 l. in which A. was bound to the plaintiff, which was delivered to the defendant by the plaintiff and A. upon a certain condition in indifferent hands, and the condition is broken of the part of A. The defendant said that the writing of a great sum was delivered to him by them upon condition contained in an indenture remaining in the hands of the defendant, absque hoc that he received the writing contained in the count and a good plea, though he did not say of what sum; for he pleads it to the action, but if he had pleaded it to the writ, he should have shewn what sum, to the intent to give a better writ, and the issue was entered, that he did not receive the writing of such a sum as the plaintiff counted; Prist and the others e contra. Br. Charters de terre, pl. 27. cites 21 E. 3. 30.

In detinue of charters as heir, bastardy is a good plea Br. Charters de terre, pl. 64.

4. Detinue of charters by J. son of T. of W. it is no plea that the plaintiff is a bastard, for he demands only chattels of which he was in possession, by which this challenge was entered, and he was compelled to answer. Br. Charters de terre, pl. 24. cites 38 E. 3. 22.

cites 35 H. 6. 9.

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5. Detinue of a chest with charters inclosed or sealed; it is not traversable if the chest be closed or sealed or not; per Finch. quod non negatur. Br. Traverse per &c. pl. 36. cites 41 E. 3. 2.

6. In detinue of charters in a chest, it is not traversable whether they were in a chest or a hamper, &c. Br. Traverse per, &c. pl. 285. cites 44 E. 3. 1.

7. Detinue

7. Detinue of two boxes with charters; the defendant pleaded re-delivery in another county, and it was said there that 7, 8, and 9 H. 2. it was awarded a good plea. *Quare*, for it seems to be non detinet argumentative, and then taking the general issue and this matter in evidence. Br. Charters de terre, pl. 17. cites 2 H. 4. 6. and see 22 H. 6. 15. and 11 H. 4. 50.

8. In detinue it is no plea that *ne baila pas*; for the bailment is not traversable; for he shall answer to the detinue. Br. Detinue de biens, pl. 50. cites 3. H. 4.

9. Detinue of a bag with 20*l.* The defendant, as to the bag pleaded non detinet, and to the 20*l.* he ought to have action of debt, & non allocatur. Br. Detinue de biens, pl. 17. cites 7 H. 4. 13.

10. By which the defendant said, that J. N. devised the 20*l.* to the defendant, and made his feme executrix, and died, and she took the plaintiff to baron, and after she delivered the 20*l.* to the defendant for his legacy, judgment si actio; and the plaintiff said, that they were his goods, *Prist*, & non allocatur, without traversing that they were the goods of the testator, by which the plaintiff justified to retain the 20*l.* for her dower, & non allocatur; for she shall be endowed of the land and not of the goods. Ibid.

11. In detinue of charters, the mesne conveyance was traversed, scil. That the plaintiff was not heir to the land prout, &c. without answering to the detinue. Br. Traverse, per, &c. pl. 51. cites 14 H. 4. 28.

H. 6. 1.—Br. Pleadings, pl. 20. cites S. C.—Br. negativa, &c. pl. 13. cites 11 H. 4. 39. and 14 H. 4. 2. 9. S. P.

But the plaintiff shall not be permitted to traverse the mesne conveyance in detinue where he may wage his law, unless in special cases. Br. Ley Gager, pl. 94. cites 21 E. 4. 55.

12. In detinue, the plaintiff, or the garnishee may declare of other bailments than the defendant acknowledged. Br. Detinue de biens, pl. 54. cites 3 H. 6. 50.

13. In detinue of charters [the defendant demanded] judgment of the count, for he has not declared of how much land the deed concerns, and therefore ill per cur' by which he amended it; for if the charter be lost or burnt, he shall recover all in damages, and the defendant pleaded to the count, because the plaintiff did not intitle himself to it, by which he amended his count, and intitled himself by gift in tail to J. by the same deed and descent to him, &c. by which the defendant justified, because the defendant is sister and coheir with the plaintiff by the same descent, and the plaintiff said, that partition was made between them and this land allotted to the plaintiff. Br. Charters de terre. pl. 1. cites 3 H. 6. 19.

14. In detinue the plaintiff counted of a bailment of charters, and the defendant said that he found them, and J. N. brought the like action, absque hoc that he bailed, and a good plea, per Martin, for if he confesses the bailment he would be chargeable to both, but now he shall not be charged but to him who right has. Br. Bailment, pl. 5. cites 7. H. 6. 22.

15. In detinue of charters of land exigent does not lie, because it sounds in the reality contra of other writings. By which the defendant

defendant said, that after the bailment be at B. in another county than the writ is brought in, delivered the same box and charters again, judgment *si actio*, * and a good plea; because the defendant in this action cannot wage his law; contra in action in which the defendant may wage his law; note the diversity. Br. Charters de terre, pl. 29. cites 8 H. 6. 29.

16. In detinue of charter the plaintiff counted that the deed was delivered to follow the estates of land and that he is heir to it; this is not double. Br. Charters de terre, pl. 3. cites 9 H. 6. 15.

17. Otherwise, it is if he had counted that it was delivered to deliver to him, and that he is heir to the land; Note the diversity. Ibid.

18. And the defendant pleaded fine with warranty of a collateral ancestor, and the best opinion was, that this is no plea; for though the plaintiff shall be barred of the land, yet the conusee has no right to the land, and also in formedon in remainder, it may be that the plaintiff may avoid the fine. Br. Charters de terre, pl. 3. cites 9 H. 6. 15.

19. Detinue against executors of bailment made to the testator of charters to rebail to him or his heirs, the executors said, that they delivered them to J. N. who has title to the land, and a good plea by several; for though the testator may charge himself doubly by his acceptance, yet executors, nor he who finds a deed, shall not be charged but to him who right has, and it seems that he is no longer chargeable but during the time that he has the possession thereof; for executors, and he who finds a deed is not bound to keep it, but if they relinquish the possession they are discharged, but if they break the deed or burn it trespass lies, as appears elsewhere. Br. Charters de terre, pl. 72. cites 9 H. 6. 58.

20. In detinue of charters the defendant pleaded arbitrement. Per Babb. this is no plea; for this action is mixed with the realty, and a man shall not wage his law, nor process of outlawry does not lie. Br. Charters de terre, pl. 7. cites 9 H. 6. 60.

21. Detinue of three chests with charters, and shewed what charters were in each of them, and the defendant said, that two chests came to their hands severally as executors, and the key remained always in the hands of the plaintiff, which chests he is and always has been ready to deliver, and could not have them here for the greatness of the carriage, *absque hoc*, that he had any other chests, and to the third chest non detinet, &c. and the plea good, notwithstanding that he did not shew what the two chests they are, by reason that they are locked; for though the plaintiff declares what is in the one, and what in the other, yet the defendant cannot open them, therefore his answer good as above. Br. Charters de terre, pl. 8. cites 9 H. 6. 65.

22. In detinue upon bailment made by the plaintiff to the defendant, he pleaded that after the bailment the plaintiff took them, and after they were stole and waived in his manor, by which he seized as waif, and a good plea. Br. Detinue de biens, pl. 46. cites 10 H. 6. 21.

23. *Contra* if the goods had been stolen from the bailee; this is his folly by his mis-keeping. Ibid.

24. *Contra* if they had been robbed from the bailee. Ibid.

25. See 14 H. 6. 1. the defendant came in by exigent, the plaintiff counts of a chest with charters, and of one charter in special, the defendant pleads to the charter non detinet, and to the residue wages his law instantly, and then was permitted to make an attorney. F. N. B. 138. (A) in the new notes there (c.)

26. If the plaintiff recovers against the defendant, this recovery is no bar at another time in writ of detinue brought against the defendant by the garnishee. Br. Detinue, pl. 30. cites 21 H. 6. 35.

27. In detinue of two writings obligatory the defendant may say, that they were delivered to him by the plaintiff and J. N. upon certain condition, and absque hoc that they were delivered by the plaintiff alone, per Ascue, quod non negatur. Br. Barre, pl. 29. cites 21. H. 6. 35.

Br. Garnishee, pl. 30. cites S. C.

28. It seems it is no plea in detinue of goods to say, that before in detinue and garnishment against him (the defendant) he did recover the goods. Heath's Max. 62. cites 21 H. 6. 55.

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29. In detinue of charters concerning frank-tenement, the plaintiff declared upon a bailment made by himself at A. in the county of Middlesex, the defendant said, that he re-bailed them to the plaintiff at A. in the county of S. Priſt, and because the re-bailment was in another county than the writ was brought in, and also of charters, the defendant cannot wage his law, therefore a good plea, per tot. Cur. Br. Charters de terre, pl. 33. cites 22 H. 6. 15.

30. In detinue of charters it is a good plea that he delivered them in another county, without answering to the detinue, per Laicon, because he cannot wage his law, quod non negatur. Br. Charters de terre, pl. 40. cites 37 H. 6. 10, 11.

31. Detinue of a box with charters and muniments concerning the inheritance of the plaintiff, and counted of four charters special, and said to one that his father, whose heir he is, was seised of so much land in D. in fee, and possessed of a charter, by which J. gave the land to his father in tail, and died, and the land descended to him, and well as to the first deed, notwithstanding that he said that his father was seised in fee, and possessed of the deed by which it was given in tail; for it may be that he discontinued and retook an estate in fee, and yet the deed belongs to the heir in tail, quod nota. Br. Charters de terre, pl. 47. cites 38 H. 6. 24.

32. And to another counted of a deed indented by which his father gave to R. in tail, who died without issue; and so the deed belonged to him, because the land is reverted to him as heir, &c. And to another deed, inasmuch as his father and W. N. were seised in fee, and leased to N. for life, reserving the remainder to the father in fee, and N. died, and the father died, and he is heir to him, and so it belongs to him. And to another deed by which J. gave certain land to him and his feme in fee, and that the box and charters came to the defendant by trover. And of the three deeds the court held with the plaintiff; but as to the fourth deed that the writ shall abate; for upon trover the baron

and feme ought to have joined in action; but if it had been of bailment made by the baron alone, he alone shall have the action, and so the writ shall abate of this parcel, per Cur. and not in toto. Br. Charters de terre, pl. 47. cites 38 H. 6. 24.

33. By which as to the other three charters the defendant pleaded re-delivery in another county, and to the box and other charters waged his law, and performed it without challenge. Ibid.

34. Detinue of charters concerning a gift in tail to his ancestor, whose heir, &c. and that the deeds were delivered upon the livery of seisin of the donor of the land in tail, and that they came to the hands of the defendant by trover. The defendant said that *ne dona pas* the land, Priff, and a good issue, quod nota. Br. Charters de terre, pl. 48. cites 39 H. 6. 5.

35. Contra if the plaintiff had counted upon bailment. Ibid.

36. Detinue of charters by which *J. N.* gave to the plaintiff in tail, or if *cui in vita* be brought which *W.* gave to her in tail, *ne dona pas* is a good issue. Br. Traverse per, &c. pl. 333. cites 39 H. 6. 35.

37. In detinue the plaintiff demanded a deed in which was contained that this same plaintiff infeoffed *J. N.* of such land, and did not say (by which be infeoffed *J. N.*) in fact, and yet well; for if he confesses seoffment, this shall be evidence against him after, and it may be, that it was delivered upon condition, which was broken of the part of the seoffee, and therefore the deed belongs to the seoffor again inasmuch as it shall not remain as an evidence against him or his heirs after. Br. Charters de terre, pl. 50. cites 39 H. 6. 36.

[36]

* All the editions are (Det) without more.

38. * Detinue by the baron and feme, of the livery of the feme, *dum sola fuit ad reliberand'* quando, &c. The defendant said, that before the feme any thing had *R.* baron of the feme was possessed, and lying upon his bed, sick, charged the feme to deliver them to the defendant to his own use, and made the feme his executrix and died, and she, being sole, delivered the goods to the defendant accordingly, *absque hoc*, that she delivered to re-deliver prout, &c. and held no plea; for he may wage his law, or plead the general issue. Br. Detinue de biens, pl. 38. cites 2 E. 4. 13.

39. An *hossler* may retain a horse, if the master will not pay for his eating. Br. Detinue de biens, pl. 39. cites 5 E. 4. 2. Per Haydon.

40. And a taylor may retain the garment till he be paid for the making. Ibid.

41. And where a man sells his horse for 40s. he may retain the horse till he has the 40s. unless it be agreed to pay it at a future day. Ibid.

42. In detinue of six boxes of charters, the defendant intitled himself to them, and the plaintiff said that he brought his action of other six boxes with evidences, and shewed what, which are others whereof he has not pleaded in bar, and inasmuch as he has not answered to them he demanded judgment, &c. and well, per Choke and Danby. Br. Charters de terre, pl. 35. cites 9 E. 4. 23.

43. Detinue of goods bailed to *A.* by the plaintiff, who bailed to *B.*
who

who lost them, and the defendant found them, the defendant said, that the said B. bailed them to him to bail to N. which he has done, *absque hoc*, that he found the goods prout, and by some he shall not traverse the conveyance where he may wage his law as here, and Littleton and Brian *e contra*, and then the defendant pleaded, that after the trover B. who lost, re-took them, judgment, &c. Br. Detinue de biens, pl. 40. cites 12 E. 4. 8.

44. And in detinue of bailment made in *Middlesex* the defendant may say that it was in *Essex* upon certain conditions which he has performed, *absque hoc*, that it was made in *Middlesex*, this is a good plea. Per Littleton and Brian, quod fuit concessum. Ibid.

45. And it was agreed in detinue of bailment that it is a good plea, that it was delivered to him to bail to N. which he has done. *Absque hoc*, that it was bailed to him to re-bail. Ibid.

46. It is a good plea that before the bailment A. was possessed ut de propriis, and the plaintiff took and bailed them to the defendant, and A. re-took. Br. Detinue de biens, pl. 40. cites 12 E. 4. 8.

47. Or, that after the bailment the plaintiff was outlawed, and the goods seized for the king. Ibid.

48. Or, that they were put in execution by judgment upon recovery of damages, and those are good pleas per Littleton and Brian, though he may wage his law. Ibid.

49. In detinue of charters it is a good plea, that they were bailed to him upon condition that if the feme of the defendant, daughter of the plaintiff survive the plaintiff, that then he shall retain them, and if not, that he shall render them, &c. Quod nota, per Cur. for he is not bound to render them during the life of the plaintiff, and the feme of the defendant. Br. Charters de Pardon, pl. 49. cites 18 E. 4. 18.

50. In detinue of charters by an abbot, it is a good plea, that the predecessor pledged them to him for 10l. which is not paid. Br. Charters de terre, pl. 69. cites 21 E. 4. 19.

51. Detinue of a box sealed with charters, and counted upon trover, the defendant pleaded that the plaintiff bailed them to him in pledge till 5l. was paid, and if he will pay it he will re-deliver them, and no plea per Briggs, without traversing the trover, quod non negatur. Br. Traverse per, &c. pl. 260. cites 21 E. 4. 19.

S. P. per Bryan; for otherwise he does not answer the count. Br. Traverse

per, &c. pl. 270. cites 21 E. 4. 80.

52. In detinue of a horse price five marks ad *reliberand. quando*, &c. it is no plea that he delivered it to deliver to W. N. which he has done *absque hoc* that it was bailed to re-bail, per Cur. because the defendant may wage his law. Br. Detinue de biens, pl. 42. cites 21 E. 4. 55.

[37]

53. But per Brian in detinue of bailment to re-bail, it is a good plea that the plaintiff after the bailment gave it to the defendant quod fuit concessum, and yet the defendant might have waged his law. Ibid.

Br. Ibid. pl. 40. cites 12 E. 4. 8. 3. P. per Littleton and Brian.

54. And that after the delivery the horse was sick of divers infirmities, as botts, glanders, &c. by which he died at K. before request made

made by the plaintiff to re-bail him, and a good plea. Br. Detinue de biens, pl. 42. cites 21 E. 4. 55.

55. *Contra if he had not said that it was before request; for if it had been after request, this had been the folly of the defendant; note the diversity.* Ibid.

56. In detinue the plaintiff *counted upon trover*, the defendant justified for pledges upon money lent, and per Brian this is no plea without traversing the trover; for otherwise he does not encounter the plaintiff. Ibid.

57. Where a man brings detinue of a gown and cassock, to the value of 40s. it is no good count; for *he ought to sever the price of the gown by itself, and so of the cassock; for if the one be lost so that it cannot be recovered, he shall recover the whole 40s. for this only, which is not reason, and therefore it would be error; per Bryan Ch. J. but the prothonotaries were against him; and it seems to me that it may be severed by the verdict, notwithstanding that the count be general of one intire sum.* Br. Damages, pl. 129. cites 31 E. 4. 77.

58. Detinue of diverse parcels of goods, tender of part of them is a good plea of them before verdict. Br. Tender, pl. 39. cites 1 R. 3.

59. *Contra after verdict where the inquest taxes a sum in gross for damages of all the goods, and shall not sever the damages.* Br. Tender, pl. 39. cites 1 R. 3.

60. The plaintiff may count of a waggon full of wood ad valentiam &c. in one gross sum. Br. Count, pl. 75. cites 1 R. 3. 2. 3.

61. *So of a flock of sheep, bushel of grain, &c. which are intire, and need not shew the price of each thing by itself, nor the value.* Ibid.

8. P. Br.
Traverse
per Sans pl.
7. cites 2. C.

62. Detinue upon trover, the defendant justified for distress of the same goods for rent arrear, judgment si actio, and did not answer to the trover, and good per cur. for it is not traversable; but in the case of 27 H. 8. 33. Shelley said, that in some case trover is traversable, which Fitzherbert expressly denied. Br. Detinue de biens, pl. 2. cites 27 H. 8. 22.

63. In Detinue for 40 quarters of wheat, the plaintiff declared simply upon a contract for corn; the defendant pleaded that the plaintiff was to pay for it immediately when he came for the corn, otherwise the contract was to be void; and said that he had delivered the plaintiff 20 quarters, which the plaintiff had paid for; but that afterwards he delivered 10 quarters more, which the plaintiff had not paid for. Held, that the plea was good without a traverse; that the contract was simple, for the traverse ought to be by the plaintiff (viz.) that the contract was simple abique hoc, that it was conditional. Dyer 29. b. 30. a. pl. 201. Hill. 28 H. 8. Anon.

64. A release of all actions personal is a good plea in bar in detinue of charters. Co. Litt. 286. b.

65. If a man have goods delivered to him to deliver over to another, and afterwards a writ of detinue is brought against him by him who has right unto the goods; now if the defendant, depending the action, delivers the goods over to him to whom they were bailed for him to deli-

ver

over them, this is a good bar in the action, because he has delivered them according to the bailment made unto him. F. N. B. 138. (M).

66. Where detinue is brought of several things, the sure way is to count specially of the value of every thing by itself. Jenk. 112. pl. 19.

67. The plaintiff shall not have more damages than he counts for; for the judgment is to have the thing detained, and damages for the detention if the thing itself cannot be had. Jenk. 228. pl. 23.

(D. 6.) Garnishment,

1. **I**N Detinue the plaintiff counted of a statute merchant delivered to the defendant, who prayed garnishment against B. and had it, who came and pleaded release of the plaintiff, and the case was, that B. was bound in a statute to the plaintiff in 100l. and after the plaintiff released to B. all actions and after they two delivered the writing to the defendant, upon certain condition performed to be delivered to the defendant, and if not, then to the plaintiff, and the said B. pleaded this release in the action of detinue upon the garnishment, and the plaintiff demurred because the delivery was after the release made, and yet, because the debt and sum in the statute is determined by the release, and therefore it shall be in vain for the plaintiff to recover the writing, and cannot have action upon it, and therefore he was barred by award, quod nota. Br. Releases, pl. 30. cites 39 E. 3. 23.

2. In detinue of deeds or an obligation, if the defendant prays garnishment, and the garnishee comes and is at issue with the plaintiff and after dies, the writ shall not abate, but re-summors shall issue against the defendant, and scire facias against the executors of the garnishee; But if the defendant dies, the writ shall abate, and yet he is out of the court by the appearance and plea of the garnishee, and the judgment shall be against the defendant of the writing and against the garnishee of the damages, and distress shall issue against the defendant to deliver the writing. Br. Charters de terre, pl. 5. cites 9 H. 6. 36.

3. In detinue the defendant prayed garnishment against a stranger, and had it, and two nibils returned, and yet he had process at his prayer to warn him in another county. Br. Process, pl. 152. cites 6 E. 4. 11.

4. Detinue of bags and charters sealed, the defendant said that it was bailed to him by the plaintiff and B. upon a certain condition, and that B. is dead and made no executor, nor is the administration committed, and prayed scire facias to warn the heir of B. and the ordinary, for he does not know whether the writings are real or personal. Per Brian it is not error, though you have your prayer, wherefore sue &c. Br. Bailment, pl. 9. cites 14 E. 4. 1.

5. Detinue is brought for a deed, the defendant pleads, that the plaintiff

plaintiff and one A. delivered the deed to him upon condition, and that it was to be delivered to the plaintiff, if the condition was performed; but if otherwise to be delivered to A. and that the defendant does not know whether it be performed or not; and he prays a scire facias to warn A. This scire facias issues against A. and although 20 nihil be returned against A. the plaintiff shall not have the writing delivered to him; for the defendant is not in fault. If the garnishee appears he cannot vary from the condition alleged by the defendant; for if he varies, the plaintiff shall have the deed by judgment against the defendant; and the garnishee shall also have detinue against the defendant, if his allegation of the condition is false. Jenk. 101. pl. 96.

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(D. 7) Verdict.

1. **DETINUE** of evidences; the jury found damages, and did not inquire whether the evidences were burnt or not, by which new enquest was awarded. Br. Enquest, pl. 85. cites 20 E. 3. and Fitzh. Office de Court 22.

* S. P. by
Doderidge
J. 2 Bullt
208.—Litt.
Rep. 342.
Arg. S. P.

2. In detinue the jury ought to find the particular value of every particular thing demanded by reason of the damages; per Doderidge J. Roll Rep. 128. Hill. 12 Jac. B. R. cites 3 H. 6. 4. 7 H. 6. 43. 1 H. 7. 3. 33 H. 6. 21 H. 7. * [77. b.] 11 H. 7. 5.

See. tit.
Judgment.
(H).

(E) How the Judgment shall be.

He shall re-
cover all in
damages.
Br. Detinue,
pl. 5. cites
21. H. 6.
35. per
Newton and Paston.

[1. **I**N detinue of charters, if the issue be upon the detinue, and it is found that the defendant hath burnt the charters the judgment shall not be to recover the charters, for it appears that he cannot have them, but he shall recover the * value of the land in damages. Contra, 17 Edw. 3. 45. adjudged.]

* S. P. But in trespass of charters taken he shall not recover damages but only for the taking

contra pacem; and therefore in the one case the value of the land shall be alleged in the count, but in the other it need not. Br. Charters de terre, pl. 26. cites 21 E. 3. 28. and 17 E. 3. 45.

2. In detinue of 40 charters the defendant offered nine and denied the rest, and so to issue and delivered the nine, and the plaintiff received them, and the defendant was amerced for detaining them. Br. Charters de terre, pl. 23. cites 38 E. 3. 3.

Br. Garni-
shee, pl. 1.
cites S. C.—
Br. Char-
ters de ter-
re, pl. 2.
cites S. C.

3. Detinue was brought of a bag of evidences, and of a charter of the tail of the manor of B. to which the plaintiff is heir, and shewed how heir, &c. and the defendant said, that J. N. was possessed of the bag and charters, but what charters were in it he did not know, and died, and the defendant is executor to him, and the bags and deeds therein came to him as executor, and said, that the lord F. had entered into part of the land, and if any of the charters belonged to him or not he did not know, and prayed scire facias against the lord F. &c. Per

Martin

Martin he shall not have scire facias but where he confesses the thing demanded which he has not done, and also he ought to make privity of bailment which he has not done. But per Cockain and Babington scire facias lies well; quære, and per Martin they may open the bag to see to whom the deeds belong. Contra per Babington and Cokain, for they cannot know upon sight of them Br. Scire Facias, pl. 4. cites 3 H. 6. 35.

4. In detinue, if judgment be had for the plaintiff, and afterwards judgment be reversed, restitution shall be made to every one that hath lost. Arg. 2. Brownl. 82. cites 7 H. 6. 42.

5. If the deed be taken and burnt, the plaintiff shall have trespass, and shall recover damages, but in detinue thereof he shall recover the writing itself. Br. Charters de terre, pl. 7. cites 9 H. 6. 60.

6. Where it is awarded in detinue that the plaintiff shall recover the charters demanded if they can be delivered, and 40s. damages, and if they cannot be delivered, 10l. there a distress only shall issue to make delivery of the charters recovered, and if there be returned in issues a nihil, and he does not come and deliver the charters, execution shall be awarded * of the greater sum, as appears there; and so see a conditional judgment there. Br. Executions, pl. 55. cites 22 H. 6. 41.

Br. Judgment pl. 76. cites 21. H. 6. 41. — S. P. Ibid. pl. 101. cites 7 H. 6. 31. — Br. Issues ret. pl. 8. cites S. C.

7. Detinue of a chest with charters and muniments by F. against R. who pleaded that non detinet, and it was found against him to the damage of 40s. if he may have livery of the writings, and if not to the damage of 40 marks, by which the plaintiff had judgment to recover the writings, and the damages of 40s. and distress to the sheriff to distrain him to make deliverance returnable, octab. Mich. at which day the defendant was demanded upon pain of his issues, and made default, and no judgment upon the default, nor any issues entered the second or fourth day of the octabis, by which the plaintiff prayed execution of the chest with charters, and at this day writ of error was sued forth. And note, that at the day of the distress the defendant cannot have any plea to the matter; for if he appears or makes default, execution shall be awarded. But he may say to save the issues that the chest was so great that he could not carry it, but then he shall be awarded to make deliverance to the sheriff, and by the writ of error their hands are closed, so that they cannot award execution. Br. Charters de terre, pl. 34. cites 22 H. 6. 41.

* [40]
Br. Detinue de biens, pl. 26. cites S. C.

8. And per Brown, if the sheriff had returned nihil upon the distress, yet execution shall be awarded; for a man shall have but one distress returnable in this case, quod nota. Ibid.

Br. Detinue de biens, pl. 26. cites S. C.

9. Detinue of two writings, to the one the garnishee who came by process, said, that it was delivered upon condition, that if he stand to the arbitrement of J. N. of all matters between the plaintiff and him, that he shall re-have it, and said, that J. awarded, that he shall pay 40s. to the plaintiff, which he tendered, and the plaintiff refused and prayed livery, and a good plea, without saying, that he is yet ready; for the 40s. is not in demand now. And to the other deed he said nothing, by which the plaintiff recovered it without damages, per cur.

est: because he has not been delayed thereof, quod nota. Br. Characters de terre, pl. 45. cites 36 H. 6. 26:

Br. Damages, pl. 84. cites 3. 2.

10. Detinue upon a writing of 30 quarters of barley, price 20l. and found for the plaintiff, and they found the price at the time accordingly, and when it should be delivered to the plaintiff at 33s. the quarter, but at the time of the making of the deed, the price was 20s. and the plaintiff recovered the price, as it was at the time that it ought to have been delivered, quod nota, and 33s. the quarter, 18l. in all, and recovered the price and all in damages as it seems, and not the barley itself. Br. Detinue de biens, pl. 28. cites 9 E. 4. 49.

11. In detinue the plaintiff shall not recover damages, but where the thing demanded cannot be re-delivered. Per Cur. Br. Detinue de biens, pl. 48. cites 1 E. 5. 5.

12. But this seems to be of damages to the value of the thing demanded, but it seems that he shall recover damages for detinue of the thing, though the thing itself be recovered. Br. Ibid.

13. The plaintiff declared of three gold rings, and certain parcels of cloth, &c. to the value of 30l. in a gross sum, and the defendant pleaded to all quod non detinet, and the jury found that he detained all to the damage of 30l. if the stuff could not be re-delivered. And there it is agreed, that the plaintiff upon offer of the defendant of part of the stuff, is not bound to receive it, but may refuse it if he does not offer all, and then he shall have all the damages, but if he receives any part of the stuff, he has foreclosed himself of all the damages, and therefore, because the declaration was of a sum in gross, and the defendant pleaded a plea to all, and the jury gave intire damages, and did not sever them in the verdict or in the declaration, therefore per judicium, the plaintiff recovered after long argument, but this was against the opinion of several. But it was agreed, that plea of tender of part of the stuff before action brought, and that the defendant refused, is good in bar; quod nota bene. Br. Detinue de biens, in pl. 48. cites 1 R. 3. 1.

[41]

14. If the bailment be at the peril of the bailor, the bailee shall recover no damages; for he is not chargeable over to the bailor. Br. Bailment, pl. 8. cites 3 H. 7. 4.

See Peters v. Heyward at tit. Judgment (H) pl. 5, 6.

15. Judgment in detinue, that the plaintiff shall recover the goods or the value, there shall go to the sheriff a *disringas* to the defendant ad deliberanda bona, and if he will not, the plaintiff shall have the value as it is taxed by the inquest, and so it is in defendant's elections to deliver the goods or value to the plaintiff. Per Frowike Ch. J. Kelw. 64. b. Trin 20 H. 7.

16. In detinue the plaintiff shall recover the thing detained, and therefore it must be so certain as it may be known; and for this reason it lies not for money out of a bag, or chest, and so of corn out of a sack, &c. Co. Litt. 286. b.

In Detinue the plaintiff shall have no more damages than he has declared for;

17. In detinue the thing itself may be recovered; if not the thing itself, the value of it, upon the return of the sheriff that he cannot find the thing detained; and if he can find it, then the thing itself, and damages for the detention; but let the plaintiff in detinue take care in his count for damages; for where the value of the thing detained

~~Detained~~ exceeds the count, in this case he *shall recover no more* for the judgment is to have the thing detained, and damages for the detention. If the thing detained cannot be had, the sheriff shall inquire de damnis, and the plaintiff shall have judgment for the value and detention upon, and according to, the sheriff's return, that he cannot deliver the thing by the defendant's fault. Jenk. 222. pl. 22.

18. In detinue for a bond of 20*l.* where a verdict is found for the plaintiff; the judgment for the plaintiff ought to be to recover the bond; or if the bond cannot be had, then to recover 20*l.* with damages and costs. Judged often so; and not the bond, or the value of the bond; for that leaves the election to the sheriff. Jenk. 320. pl. 24.

For more of Detinue in general, see *Actions of Trover, Bailments, Debt, (P.) &c. Fasts, (L. a) &c. Inns and Innkeepers, (B.) Justification. Trespass, (Y.)* And other Proper Titles.

Devise.

(A) Testament.

What Persons may make it.

[1. *A Bishop* may make a testament. 2 H. 4. 2. b.]

[2. So an *archdeacon* may. 2 H. 4. 2. b.]

[3. So a *parson* may. 19 H. 6. 44. b.]

Fitzh. Testament 1.

notes S. C.—Br. Arrerages, pl. 6. cites S. C. and S. P. because his executor shall have the arrerages incurred in his time.

[4. So a *dean* may. Con. 19 H. 6. 44. b.]

[42]

Fitzh. Testament, pl. 1. cites S. C. that a dean cannot.

[5. But an *abbot* or *prior* cannot make a testament. 2 H. 4. 2. b.]

Fitzh. Testament, pl. 1. cites S. C. that an abbot cannot,

[6. A *master of an hospital* cannot make a testament. 19 H. 6. 44. b.]

Fitzh. Testament, pl. 1. cites S. C. See pl. 7. Fitzh. Testament, pl. 1. cites

[7. A *warden of a house* that has a covent and common seal cannot make a testament. 19 H. 6. 44. b. adjudged (it seems to be intended of the house.)]

S. C. because they have common seal, and all the advantage which comes, accrues to the use of the house, and therefore if one of them dies, his successor shall have a scire facias of a recovery incurred in the time of the predecessor; adjudged.—Br. Arrerages, pl. 6 cites S. C. that if master of a hospital who has confreres brings a writ of annuity and recovers, and dies, the successor brings scire facias to recover the arrears, he shall have them, and not the executor of the master; for he cannot make executor in respect of any thing which pertains to the corporation.

[8. A

* Fitzh.
devise, pl.
28. cites
S. C. issue
was joined
(Q. a.) pl. 3.
and the notes there.
And see good.

[8. A *feme covert* may make a testament if the baron agrees to it after her death. * 26 E. 3. 71. Mich. 8 Jac. B. Graunt's case, per Curiam.]

on the delivery of the goods bequeathed by the wife.—See tit. baron and feme (Q. a.) pl. 3. and the notes there. And see *ibid.* (R. a.) in what cases wills made by *feme coverts* are good.

[9. A *feme covert executrix* cannot devise any of the goods which she hath as executrix without the assent of the husband, or his agreement after, though she may make an executor without his assent. Mich. 8 Jac. B. Graunt's case, per Curiam.]

[10. So a *feme covert* cannot devise *things in action*, which she hath, without the assent or agreement of the husband. Mich. 8 Jac. B. Graunt's case, per Curiam.]

[11. Rot. Parliamenti, 18 Ed. 3. Numero 12. the commons prayed, that where a constitution was made by the prelates to take tithes of all manner of wood, which was a thing never used, and that niefs and *femes* might make testament, which is against reason, that he would please, by himself and by his good council, to ordain remedy, and that his people might remain in the same estate, as they had used to be in the time of all his progenitors, &c.]

[Answer, The king will that what is law and reason should be done.]

12. One who had made his will and became ill, (and as it seems) had lost his speech, the same will was delivered into his hands, and it was said to him that he should deliver it to the vicar, if it should be his last will, otherwise he should retain it, and he delivered it to the vicar, and this was held a good will. Thel. Dig. 6. lib. 1. cap. 7. f. 8. cites 44 Aff. 36.

13. A. seised of land is *disseised* and devises the same; the devise is void by the word (having) in the statute. 38 H. 8. Arg. And. 349. Mich. 29 & 30. in case of Butler v. Baker.

14. Feoffor of land to uses of his last will has the fee and may make his will thereof, as if no such feoffment had been made. And. 246. pl. 259. Mich. 31 & 32 Eliz. Betty v. Trevillian.

[43] 15. Lands holden in knight's service are given to J. S. in tail, scil. to the heirs male of his body remainder to his right heirs. J. S. devised these lands and after dies without issue male, the same is good for two parts; yet during his life he had not any estate in possession. Per Egerton Arg. 3 Le. 276. Mich. 33 & 34 Eliz.

16. The king gave lands to A. in fee to hold by knight's service during his life, and after to hold in socage; A. may devise the whole for all the time, when the devise took effect he was tenant in socage. Arg. 3 Le. 276. Mich. 33 & 34 Eliz.

17. Administrator cannot devise the goods he has, as administrator, nor will they go to his executor; but on his death bed he may give them by word of mouth, though not by will. Wentw. of Executors 18.

18. One who has an estate for years by lease, wardship, or extent, &c. in right of his wife, or has the next avoidance of a church in her right, cannot by will give or bequeath any of these, but notwithstanding

withstanding they will remain unto his wife on his death. Wentw. of Executors 18, 19.

19. A man *outlawed* in a personal action, or a person *attainted of felony or treason* cannot devise any chattels real or personal. Noy's Comp. La. 99.

20. An *infant* of the age of *eighteen* may make a testament, and constitute executors for his goods and chattels. Co. Litt. 89. b.

one's devise his land, unless the custom so extends expressly, that he may devise within age. Br. Devise, pl. 47. cites 37 H. 6. 5. and 11 H. 4. accordingly.

An *infant of 14 years of age* may make a will, and thereby make executor of his goods. Noy's Comp. La. 99.—2 Mod. 315. Trin. 30 Car. 2. B. R. in case of Smallwood v. Brickhouse it was said per cur. that the spiritual court sometimes allows wills made by persons of 14 years of age, and the common law has appointed no time, but it wholly depends on the spiritual law; and if they adjudge a person capable, this court will not intermeddle, it being a matter within their jurisdiction.—2 Show. 204. Trin. 34 Car. 2. Smallwood v. Berthouze S. C. held accordingly, and that an appeal lay to the delegates; and that whatsoever our law books say concerning it, 'tis only as directed by their law.—2 Jo. 210. Litchfield (Chancellor's case) S. C. and if the inferior court gives sentence contrary to the spiritual law, the party has remedy by appeal.—Glib. Equ. Rep. 74. Hill. 3 Ann. Hyde v. Hyde, says that in this case no dispute was made but that a male infant of 14 years of age, and a female of 12, might make a will of a personal estate; and Mr. Gilbert said it was so agreed by Lord K. Wright, in case of Sharp v. Sharp, wherein they followed the rule of the civil law of Justinian for their consent to marriages at such ages.

21. *Head of a college* cannot devise land to his own college, because when the devise should take effect, the college is without a head, so an imperfect body and not capable. 4 Le. 223. pl. 357. in time of Q. Eliz. B. R. Corpus Christi College's case.

22. Sanæ *memorie* for making of a will is not always where the party can say *yea* or *no*, or has life in him, nor when he can in some things answer with sense. But he ought to have *judgment to discern* and to be of *perfect memory*, otherwise his will is void. Resolved per the judges. Mo. 760. pl. 1051. Pasch. 3 Jac. Combes's case.

in law, yet so much thereof as was drawn from him by practice and *circumvention* ought to be made void in equity (especially where they are made to the benefit of strangers). Chan. Rep. 24. 3 Car. in case of Herbert v. Lownds.

23. *Executor* cannot devise the *goods which he has as executor*; per Williams J. Arg. 3 Buls. 7 Hill. 12 Jac. For he has them not properly as his own, or to his own use, but he may make a continuation of the *executorship*, and his executor shall have them as executor to the first testator. Wentw. Off. Executor 17, 18. cites it as resolved. Hill. 30 Eliz.—Wentw. Off. Executor 86. S. P.

24. A *bargain* and sells land to B. *upon condition* by indenture inrolled, that upon payment of 300l. at the end of three years it should be void, and that in the interim the bargainee should not meddle with the profits of the land; the bargainor occupies and makes a lease for five years and at the day doth not pay the money; B. doth not enter but (A. occupying it) he devised the land, and adjudged a good devise. But if he had been *disseised* the devise had been * void. Arg. per Cur. Cro. C. 304. cites Hill 18 Jac. Rot. 1230. Powlsley v. Bertram.

and after several arguments, adjudged.—Bridgm. 201. S. C. adjudged.

* [44]

25. *Tenant in tail of an equity of redemption* may devise it for the payment

payment of his debts; sic dictum fuit. Vera. 41. pl. 39. Pasch. 1682. in case of Turner v. Gwynn.

For in case of jointenants all will survive, but by act in his life he may dispose of his part, and the assignee may dispose of his moiety by his will, though it be *half an horse* or ox, which can't be divided. Wentw. Off. of Executor 18.—
26. Tenants in common may no doubt devise, though jointenants cannot; per Sir Joseph Jekyll Arg. agreed, 3 Ch. R. 175. Trin. 7 Ann.

But parteners may if seised of tenements devisable. Litt. S. 287.—Co. Litt. 185. b. says the reason is evident; because there is no survivor between parteners, but the part of the one is devisible, and consequently may be devised.

Wentw. Off. Executor 16. says it may be some doubt, but seems to incline that he may.
27. Excommunicated person cannot make a will, or if he does it cannot be proved. Arg. 9 Mod. 114. Mich. 11 Geo. 1. in Canc. Milford v. Croom & al^s.

A. A. will is thus defined (viz.) It is a declaration of the mind (either by word or writing) in disposing an estate, and to take place after the death of the testator; and this is called a will. Carth. 38. Trin. 1 W. 2. M. in B. R. Lea v. Libb.

(A. 2) What is a * Will; and though it be made in the Form of a Deed.

1. A. by indenture reciting a feoffment to H. and others, &c. and that it was to the intent that his feoffees should perform his will as followeth in effect; viz. *My will is*, that my said feoffees shall stand seised to the uses, that the said H. shall receive of the said lands 100l. which he had lent to the said A. and also to stand seised to pay all his debts upon bills signed with his hand, and after the debts paid, that the feoffees shall make estate of the said lands to him the said A. and J. his wife, and to the heirs of their bodies, &c. with divers remainders over. This is not a last will; but an intent. 4 Le. 166. pl. 270. in the time of Q. Eliz. Ld. Audley's case.

D. 166. pl. 8. Hill. 1 Eliz. S. C. and reports it to have been concluded thus, viz. *In witness, &c. to this will, &c.* yet held no will.—It cannot be a last will, because an estate was to be executed in the life of the testator. D. 166. pl. 9. S. C.—4 Le. 210. pl. 341. 28 Eliz. in Canc. S. C. in totidem verbis.—2 Le. 159. pl. 194. 21 Eliz. in Canc. S. C. in totidem verbis.—Jenk. 217. pl. 62. S. C. the feoffment was made, and the feoffor died before the stat. 27 H. 8. of uses; and resolved accordingly by all the judges of England. Jenkins says that if a fine, feoffment, or recovery be originally to the use of a will, and afterwards the owner of the land declares by indenture that a stranger shall have the land without a consideration; or that any of his blood shall have it; this indenture amounts to a will, and is revocable; in the principal case, there is only an intent; and perhaps his debts are so great, that no estate shall ever be made; for it is limited after the payment of his debts; and in the principal case, although the use originally be to the use of the will of A. and so the fee of the use is in A. yet the said indenture before the statute of uses, declaring, that the feoffee shall convey it to him and his wife in tail; he thereby declares the intent of the use aforesaid to be, that the feoffee shall have the use in fee to the intent aforesaid.

2. A paper-writing left with a will and written after it; though it is no will, yet it amounts to a declaration of the intention, and so decreed. Chan. Rep. 265. 19 Car. 2. Hawtre v. Trollop.

3. On a question, whether a will or no will? the plaintiff produced a deed indented made between two parties, the man and his son; and the father did agree to give the son so much, and the son

did agree to pay such and such debts and sums of money; and there were some particular expressions resembling the form of a will; as, that he was sick of body, and did give all his goods and chatties, &c. But the writing was both sealed and delivered as a deed; and they gave evidence, that he intended it for his last will, which the court said, was a good proof of his will. Mod. 117. pl. 17. Paich. 26 Car. 2. B. R. Green v. Proude.

4. Directions were given for a conveyance and scoffees named, but blanks left for their names, in order to charge lands with younger children's portions, in pursuance of a power by decree, or will, to charge the same. Deeds drawn and ingrossed were found a will and the money decreed, though the person died before any thing was executed, and though the power was not exactly pursued, and though no writing mentioned the conveyance to be a will. Chan. Cases 265. Mich. 27 Car. 2. Smith v. Ashton.

Fin. Rep. 273. S. C. the person prepared notes in writing which he declared should be the effect of his last

will, and which were (as he called them) instructions for counsel to draw up his last will in form. Upon a trial directed out of Chancery; a verdict was found for the will, and decreed it a good execution of the power, and that the notes were a clear demonstration of his intention.—3 Keb. 551. pl. 69. Mich. 27 Car. 2. in Canc. S. C. it was said Lord K. Finch held that power to convey by deed or will under hand or seal was well executed by a will subscribed by the name of the deviser, though never sealed, there being a full intent of the deviser appearing, and decreed accordingly.—3 Salk. 277. pl. 6. S. C. and mentions it as a will.

A will, though not signed by the testator, is good in equity to charge the heir at law in the realty, as well as the executor in the personality. Arg. 8 Mod. 13.

5. A writing purporting an indenture, but declared by the party to be his last will, and by which he gave several legacies and made two executors, was decreed to be a good will. Fin. R. 195. 27 Car. 2. Hickson v. Witham & al'.

Chan. Cases 248. Hixson v. Wytham S. C. the counsel against the

will gave up the point as to its not being a will, and the lord keeper agreed that it was a will.—Freem. Rep. 305. pl. 374. S. G. in Canc. but S. P. as to its being a will or not, does not appear.

6. If a man writes the same will over in another paper, and declares that to be his will, that is not aliud testamentum, but it is idem testamentum; for the testamentum is the thing contained, and not the paper; it is just as if a man makes a duplicate of his will, still it is but one will, per Pemberton serjeant; Arg. Show. 559. Mich. 4 Jac. 2. B. R. in case of Hitchins v. Bassett.

7. After a testator's death one sheet was found in one house, and a second sheet in another house, yet adjudged a good will; cited by Dolben J. as the Earl of Essex's case. Cumb. 174. Mich. 1 W. & M. in B. R.

Show. 174. S. C. and S. P. cited by Dolben J. as adjudged.

(A. 3) Deed and Will referring to each other. Construed how.

1. **T**ESTATOR executed a deed, in which several annuities were expressed. Afterwards by his will he devised such rents as are mentioned in such deed, (referring to it) according to the meaning of

of his said deed to his younger children. It was held, that this is a good devise in writing of the annuities; for it refers to the deed whatever it is, as if it were specially limited in the will, and is a good devise to them of the several annuities. Cro. J. 145. pl. 4. Hill. 4 Jac. B. R. *Molineux v. Molineux*.

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2. A. made a deed of feoffment without livery to divers uses, and afterwards by will devised the land to such persons, and in such manner as he had appointed by his deed of feoffment. It was held to be a good devise; cited per Tanfield, Cro. J. 145. Hill. 4 Jac. to have been adjudged in the court of wards, in Fairfax's case.

3. On issue out of the chancery, to try whether the plaintiff were intitled by two writings, or any other purporting a will of J. S. and the evidence was of a feoffment to the use of such person as J. S. shall name, and appoint by his last will, in which case the devisees are in the feoffment, and not by the will; but per Cur. that is only fictione juris, but they are not in without the will, and therefore that is the principal part of the title; and such proof good enough, and pursuant to the issue, and verdict for the plaintiff accordingly. Keb. 570, 571. pl. 24. Mich. 15 Car. 2. B. R. *Bartlet v. Ramsden*.

4. A. having power to charge lands with 1500l. sent notes to counsel to draw a conveyance for the charging land with the 1500l. but without naming to whom or any feoffees, and dies before any thing more is done; these notes in writing were decreed to charge the estate, and made as part of the last will of A. though no writing mentioned it to be so. 1 Chan. Cases, 265. Mich. 27 Car. 2. *Smith v. Ashton*.

5. A. devised 3000l. to all the natural children of B. his son, by J. S. and directed the executors to pay it as A. by deed should appoint. There were some children born before the will made, and some after the will; and before the declaration by deed. Then A. by deed appointed the 3000l. to all the children of B. by J. S. It was insisted that this depended now upon the deed, and therefore must refer to the children born at the time of the execution of the deed. But Ld. C. Parker held, that the deed referring to the will is, as to this purpose to be taken as part thereof. Wms's Rep. 529, 530. Hill. 1718. *Metham v. Duke of Devon*.

(B) Devise at the Common Law.

What Estate might be devised at the Common Law.

See 6 Rep.
17. 2. in
principio.
Hill. 4r
Eliz. in

[1. **A**N estate in fee could not be devised by the common law, because it was presumed, that he did that in extremis that he would not do in his health, that it proceeded from the distemper of his mind, by the anguish of his disease, or by sinister persuasion,

persuasion, to which he is now more subject than he was in his health.] Wild's case. And it is there said,

that if any such gift made in time of malady shall be good and firm in law, the consent and confirmation of the next heir was requisite to it.

[2. With this agrees the law of Scotland. Skeen regiam majestatem. 44. 7, 8.]

[3. He that was possessed of an estate for years, might have devised it at the common law. 50 Aff. 1. admitted.]

4. If a man infeoffs others to the use of him and his heirs, or generally without expressing any use he may make a will after, and alter the use. Br. Feoffment al' Uses, pl. 36. cites 5 E. 4. 8.

5. But where a stranger has interest by the use, or if it be to the intent to retake an estate tail, there he cannot change the use after. Ibid.

(C) What Thing might have been Devised [at { 47 } Common Law.] Fol. 609.

[1. A N estate for years might have been devised at common law. 50 Aff. 1. admitted [that it might be] by him that was possessed thereof.]

[2. A guardian by knight's service might have devised the ward of the body and land. 26 E. 3. 65. admitted of a guardian in socage, where it is held, that it is grantable over.] Fitzh. Garde, pl. 159. cites 3. C.

3. The king cannot give any thing by his testament but that which he has in possession; nor can he devise his land by his testament, per Fortescue, clearly. Br. Prerogative, pl. 5. cites 35 H. 6. 25.

4. By the common law, no testament or last will could be made of land. 2 Inst. 7. Co. Litt. III. b. S. P. and that by

the common law no lands or tenements ought to be transferred from one to another but by solemn livery of seisin, matter of record, or sufficient writing; but (as Littleton, f. 167. says) by certain private customs in boroughs they were devisable.

(D) Where it shall be void for the Uncertainty.

[1. IF a man devises to 20 of the poorest of his kindred, this is void for the uncertainty which the court shall adjudge poorest. Webb's case adjudged cited, Mich. 5 Jac. B. R. per Brock.] A devise of the profits of a term for years to 20 of the poorest of

his kindred, being his brothers and sisters children, was admitted good as a trust and confidence for them, though by reason of other words in the will appointing overseers of the will, the 20 poorest kindred had no power to make a lease of the term, but that was vetted in the overseers. Mo. 753. pl. 1040. Griffith v. Smith.

2. It was found by inquest of office before the mayor of London, that R. Jurdein was seised of certain land in London, and devised by his testament to A. for life, so that he became a chaplain to
E 3 chaunt

chaunt for his life in the church of S. in L. for the souls, &c. so that after his decease the tenements shall remain to two of the best of the fraternity of the white-towers of London for ever, to find a chaplain to chaunt in the form aforesaid, per Persey the remainder is void to the two of the white-towers; for it is uncertain; which Candish agreed. Br. Devise, pl. 21. cites 49 Aff. 8.

8 C. cited
2 Sid. 151.

3. *Termor of a house bequeaths his house to B. without expressing how long he should have it. B. shall have the whole number of years. For B. cannot have estate in the house at will, nor for term of life, nor of any years, or one year. D. 307. b. pl. 69. Hill. 14 Eliz. Anon.*

* Pl. C.
524. a. in
principio.
S. P. by
Anderson.
Hill 20
Eliz.

4. *If a man devises his land for so many years as his executors shall name, it seemeth this devise is not good; but, if it be for so many years as A. B. shall name, and he names a certain number of years in the testator's life-time this is a good devise. Swinb. 183. cites Pl. Com. 524. Anon.*

5. *Anderson said, that if one devise land to J. S. in fee, and after by the same will devise that land to J. D. for life, both parts of the will shall stand and in construction of law, the devise to J. D. shall be first. Cro. E. 9. pl. 2. Mich. 24 & 25 Eliz. C. B. Anon.*

6. *So if a devise be to J. S. in fee, and afterwards in same will, the land be devised to J. D. in fee, they are joint-tenants. And Mead said, that case had been often moved, and always ruled; that the devise is good to them both, and they shall take as tenants in common, or at least as joint-tenants. Ibid.*

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7. *And Anderson said, and it was agreed by the whole court, that if a termor deviseth to J. S. so much of his term as shall be arrear at the time of his death, this is a good devise for so much of the term as remaineth at his death. Cro. E. 9. pl. 2. Mich. 24 & 25 Eliz. C. B. Anon.*

8. *A. devised lands to his wife for life, and afterwards to the use rectorum hæredum secundum antiquam evidentiã, without saying whose heirs, nothing passes by this will for the uncertainty. Per Coke Ch. J. 2 Bullst. 180. cites it as adjudged 30, 31 Eliz. in case of Morris v. Maule.*

9. *A. devised Blackacre for erecting a school, but names no devisee, so that the devise being too general is void; then he devised Gr. Acre to B. in fee, and all his other lands to C. in fee. C. shall take Blackacre, though it was not the meaning of A. Arg. Le. 251. pl. 339. Trin. 32 Eliz. B. R. cites it as held in the case of Bennet v. French.*

Ibid. says
that Mich.
5 Car. in
the argu-
ment of
the case of
Thomas v.
Morgan,
which was
entered
Pasch. 3
Car. C. B.

10. *Sir R. F. devised his manor of E. to his executors in trust, that they shall be seised of 100 marks, part of this manor, to the use of A. and of another part of the value of 20 marks to the use of B. and of another part of the value of 20 l. to the use of C. and that a division shall be made by his executors, and that all the manor shall be valued at 100 l. and no more. It was adjudged that this was certain enough, and the cesty que uses shall be tenants in common immediately without division. D. 280. b. Marg. pl. 17. cites Pasch. 36 Eliz. B. R. Gibbon v. Warner.*

Roe. 1339. this case was put by Richardson, and agreed for law; but says it is to be taken that

that the value of the manner was expressed in the will; and this, he said, was the reason of the judgment. — A man seized of 100 acres of land devised so much of it as is of the value of 20 l. a year, this is good. Arg. Litt. Rep. 217. 218. Mich. 4 Car. C. B. in case of Thomas v. Kenn, cites Hill. 37 [Eliz.] C. B. Morris v. Lucy.

11. A devise was of two acres of land out of four acres which lay together; this is a good devise, and devisees shall have election. D. 280. b. Marg. pl. 17. cites 40 Eliz. Marshall's case.

12. A. seized of lands devised them to his wife for life, and that after her death, the same shall remain to my issue; and at the same time he had two sons, R. and G. and two daughters, E. and J. Adjudged this devise of the remainder to his issue, was uncertain what issue he intended, he having divers issues, and it shall not extend to all his issues, for a will shall be construed according to the intent of the devisors, where a certain intent may be collected, but where it is uncertain it is void. Cro. E. 742. Hill. 42 Eliz. B. R. Taylor. v. Sayer.

S. C. cited Vent. 229. by Hale Ch. J. who said, that this was a little too rank; for issue is no men collection.

Raym. 83. S. C. cited by Bridgman Ch. J. Mich. 15 Car. B. R. and said that it is not law. — Gilb. Equ. Rep. 27, 28. Pasch. 1 Geo. 2. B. R. the S. C. cited by Raym. Ch. J. in delivering the opinion of the court, who said that this had been denied to be law, and adjudged so lately in C. B.

13. A man having a brother and a daughter, devises his land to his right heirs of his name and posterity. Adjudged a void devise, and it works by descent. Mo. 860, 861. pl. 1181. Hill. 11 Jac. C. B. Cownden v. Clarke.

14. Where the husband devised lands to his wife for life, and after her death to the heirs males of any of his sons, or next of kin; Roll Ch. J. said, that the intention of the testator here is *cœca & sicca*, and senseless, and cannot be known, and we ought not to frame a sense upon the words of a will, where we cannot find the testator's meaning. Jerman J. held the devise was not void, but that the words are to be interpreted as they stand with law, and as the words will bear. Nicholas J. *prima facie* that the devise is void, but yet it is questionable. Ask. J. to the same intent. Roll Ch. J. said, that there is too much way usually given to ambiguous devises. Sed adjournatur to be argued again. Sty. 240. Mich. 1650. Beal. v. Wyman.

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15. If a man devises all his lands to one of his cousin Nicholas Amherst's daughters, that shall marry a Norton within fifteen years and dies, and Nicholas Amherst having three daughters, one of them marries a Norton within the fifteen years; this is a good devise to her, notwithstanding the uncertainty, and the law supplies the words who shall first marry, &c. Raym. 82. Adjudged. Mich. 15 Car. 2. between Baté v. Amherst.

16. If a man devise 10 l. to his servant, if he has several servants none shall take for the uncertainty; per Vaughan Ch. J. Vaugh. 185. Trin. 16. Mich. 26 Car. 2. in case of Bedell v. Constable.

17. A devise made to no person, but the thing being only devised is void at law. 2 Ch. cases 31. Trin. 32 Car. 2. in case of Perne v. Oldfield.

18. A. seized of the reversion of two messuages in fee, after the death of B. had issue two sons, C. the elder and D. the younger, and also four daughters, L. M. N. and O. devised his two messu-

ages to D. and he to have 30l. a year for his maintenance for ten years after the death of his grandfather, and the residue of the profits to be applied for raising portions for his daughters; and if D. die, then he gives the estate which D. had to L. M. N. and O. share and share alike; and adds, if all my sons and daughters die without issue, then he devises it to his sister and her heirs, &c. A. dies. The grandfather dies. D. enters and dies without issue. The four daughters enter and are seised. O. takes husband and has issue and dies, and the question was, whether the husband of O. should be tenant by the curtesy. Herbert Ch. J. said they would favour wills in their exposition, as far as they could, but *where wills are so uncertain that the intention may not be collected they ought to fall for their uncertainty.* And he said, that here the testator might have several intents, for he might intend that the daughters should have but for life, and then, that the sons should have it, and upon their death without issue, that the daughters should have it. Or he might intend, that the sons might have an estate tail after an estate tail in the daughters. Or that after the death of the daughters it should descend to the sons in fee, and if they die without issue, to the issue of the daughters; and if his sons and daughters die without issue, that he might limit a fee after to his sister, though there was a fee before, he might so intend. And therefore he said it was quite uncertain what he intended, and therefore this clause is void for the uncertainty, and that there was no estate tail in the daughters, and consequently no tenancy by the curtesy. And so it was adjudged, per tot. Cur. Skin. 266. pl. 3. Hill. 2 & 3 Jac. 2. B. R. Price v. Warren.

*[50]

MS. Rep.
Trin. 10
Ann. C. B.
Ungly v.
Peale —
30 Mod.
203. Mich.
11 Ann.
B. R. the
S. C. The
will was
held good
and certain
enough by
all the
court. For
being in
the case of
brothers,
the common
law was a
guide to the
exposition
of the word
successive,
viz. that
the eldest
should after
his mar-
riage enjoy
it first for

19. Ejectment and special verdict. A man possessed of a long term for years in lands, devises them by his will to Sir St. Andrew St. John, and his two brothers successively; provided that neither of them shall take till after they are married. Rowland the third brother dies, Sir St. Andrew dies, the second brother is lessor of the plaintiff.

The question upon this special verdict was, whether this was a good devise to Sir St. Andrew St. John and his brothers.

It was objected, that this was a void devise, for the uncertainty, *who should take first by reason of the word successively*, and Hob. 313. was cited, the case of WINDSMORE v. HOBARD, and this case was relied upon; that was a lease granted by my lord Sherton (by deed made between him and one Thomas Hobert) of tenements to the said Thomas Hobert, habend' to the said Thomas and to Nicholas Hobert, John Hobert, and Henry Hobert, sons of the said Thomas pro termino vitæ eorum, & alterius eorum successive diutius * viventium. Thomas and Henry died. The first question there, was, whether they could take jointly, and the opinion of the court was, that they could not take jointly, because Thomas Hobert was only party to the deed, and the rest were not named, but by the habendum, so that they could not take a joint interest. Then it was a question, whether they could take by way of remainder; and it was held they could not take in succession for the uncertainty, who should begin, and who should follow; and by way

way of remainder it cannot be joint, because of the word successive. But it was answered now by the court, that if the opinion of the judges had been grounded upon the word successive, that though a joint interest were given by the former words, they could not take jointly by reason of the word successive, they must have been all named in the premises of the deed, yet it seemed to the court now, that notwithstanding this word successive they must have taken jointly. If a man lease to three for term of life, or for years, habend' successive, yet they shall hold in jointure, and the word successive is void. Br. tit. Leases 54. Though my lord Hobart reports, that the ground of the resolution of the court was upon the word successive, which of them should take first, yet in 3 Cro. 57, 58. where the same case is reported, there is no notice at all taken of the uncertainty of the word successive. It is there held, that they could not take jointly; for the sons should not take in possession, because they are not named in the premises of the deed, nor should they by way of remainder, for the intent was to give them the land in possession.

In the next place, the case of GREENWOOD v. TYLER was cited; now there was a writ of error brought upon that judgment, and on the debate on the writ of error there were endeavours to distinguish this case of Greenwood v. Tyler from that of WINDSMORE v. HOBARD, but that difference was but very slight, and therefore the judges advised that the defendant to compound with the plaintiff, and so there was no judgment; but it will be very hard to make a difference. A lease to three men, habend' successive is void, because of the uncertainty, who shall take first, as 1 Le. [117. pl.] 446. SCOVEL AND CAVELL's case. And there are several other cases upon such limitations, where they are held to be void for the uncertainty who shall take first.

But in this case it was resolved per tot. Cur. That the plaintiff should have his judgment, because the devise is not void for the uncertainty. This case differs from the case of WINDSMORE v. HOBART. 1st. In this will the testator names Sir St. Andrew St. John first, and it appears that he was the eldest son. The devise is to him and his brothers successively, Sir St. John was to take first, for he was particularly named, and the word (successively) implies, that the estate was to go to the next brother after him. It is plain the testator had respect to the seniority of the brothers, and therefore named Sir St. John first. In the case in Hobart, though the lease was to the father and his three sons, yet it does not appear whether the eldest son was named first. Secondly, if the intention of the testator can be found, that ought to prevail; now the intent here is plain, by naming the eldest son first, that he had regard to seniority; it is no more than that the eldest son should have it for life, and that his two brothers should take after him; it is plain evidence of the intention, though in a deed or lease it must be in more legal words than in a will; yet the law in such case will not make the will void. Thirdly, if the word (successively) be so imperfect that it cannot be learned who should take first; yet rather than that the will should be void (successively) shall be rejected, as being a word of an imperfect signification, and the

his life, then the 2d, and then the 3d, especially when he who is named in the will is by the verdict found to be the eldest brother.

— 2 Ld. Raym. Rep. 1312. Ongley v. Peal S.C. argued, and judgment affirmed nisi causa, &c. but Mr. attorney general, who was to have shewn cause taking it to be clearly against him, never did shew cause and so the judgment was affirmed against Mr. Ongley, who was a purchaser for a valuable consideration by the advice of Mr. Serjeant Pemberton, and Mr. Richard Webb of the Inner Temple; and the reporter says his client told him, that Mr. Webb, on a further and later consideration, adhered to his former opinion, that the devise was void for

uncertainty. —
But had the devise been to *B. C. and D.* to take successively, it would not have been void for the uncertainty. 10. Mod. 104. S. C.

Such devise was held void for uncertainty. Cro. E. 742. Taylor v. Sayer.

Wm's Rep. 229. Trin. 1713. S. C.

brothers shall take jointly, had that come to be the question, and we could have learned the intention of the testator; when there are sufficient words without that word to give them a joint interest, that word shall be rejected, the intention being sufficiently certain before, and nobody can here say, but that Sir St. John and his brothers had a joint estate given them before this word came, and so the plaintiff has a good title this way, and nothing appears to sever the jointure.

Here it is sufficiently expressed by naming the elder brother first, to shew that the estate was to go according to seniority, and so the second brother has a good title for life and the plaintiff must have his judgment; judgment for the plaintiff per tot. cur. MS. Rep. Trim. 10 Ann. C. B. Ungly v. Peal.

20. It has been said, that if an estate has been given to *a man and his issue*, it is void for the uncertainty, because not appearing whether male or female; but it has been held and determined since not to be law, and that it is well enough in a devise; per Curiam. Gilb. Equ. Rep. 28. Pasch. 1 Geo. B. R. in case of Shaw v. Weigh.

21. A devise to *the heir male of E. L. lawfully begotten; and for want of such heir to his own right heirs*; there held good, although not to the heirs of the body; those words of her body wanting; yet the description supplied and made good by other words tantamount. 2 Vern. 735. Hill. 1716. cites it as adjudged in the case of Long v. Beaumont.

22. Bill for a legacy, testator *devises 550 (omitting pounds) to his daughter Mary* (the now plaintiff) and he *also devises 550 l. to his daughter Barbary, &c.* The defendant insists that the devise of 550 to the plaintiff is void for uncertainty, not saying 550 what.

Cowper C. the subsequent devise to the other daughter makes this extremely clear that the testator meant 550 l. and it is as certain and good, as if the word (pounds) had been expressed. Mich. 3 Geo. in Canc. Freeman v. Freeman.

23. A. and several others of the town of S. subscribed to a charity school for boys and girls there during their pleasure. A. being pleased with seeing the charity-children, declared that he would leave them something at his death. *A. gave 500 l. to the charity-school in S. and there was also a free-school in S.* Lord Ch. Parker said that though the free-school be a charity-school yet the charity-school for boys and girls went more commonly by that name, and as A. was fond of and declared that he would leave the latter a legacy, decreed it for that school. Mich. 1720. Wm's Rep. 674. Att. General v. Hudson.

24. A. bequeathed to B. and C. her grandchildren *some of her best linnen*. The master of the rolls held this void for uncertainty, and that if it had been *the best of my linnen* it had been uncertain, though less so than the other; but he by his decretal order recommended it to the residuary legatee to give them some off the testatrix's best linnen, and said that the court in like cases had sometimes made such recommendation. At the Rolls 2 Wm's Rep. 227. Mich. 1726. Peck v. Halfey.

(E.) Devise

(E.) Devise [by] the Custom. Of what Thing.

See tit. Customs of London (M.)

[1.] IF a rent be granted out of land devisable by custom, the rent may be devised within the custom, for this is of the same nature with the land. 22 Aff. 78. adjudged. Perkins S. 135. Contra, D. 26 H. 8. 1. Quære, D. 3. 4. Ma. 140. 38.]

Fitzh. Mortdancestor, pl. 26. cites S. C. and S. P. per

Thorpe.—Br. Customs, pl. 34. cites S. C.—Br. Rents, pl. 13. cites S. C.—Litt. S. 385. S. P. admitted.—Mod. 97. Arg. cites Litt. S. 385. but says the authorities clash in this point.

2. Note, that in London, a man may devise by testament to a common person, though the testament be not inrolled. But if he devises in mortmain, he ought to be a citizen and freeman resident, and the testament ought to be inrolled at the next hussings, and by 38 & 45 E. 3. he ought to be born in London and taxable to scot and lot, but quære inde. Br. Devise, pl. 28 cites 30 H. 8.

Br. devise, pl. 22. cites 5 H. 7. 19. per Br. S. P.

3. In some places the custom is general, that he may devise any lands, &c. In some places he may devise lands only which the donor purchased. In some places he may devise any estate. In some places for life only, &c. Co. Litt. 112. b.

4. By the special custom an infant may devise gavelkind land at the age of fifteen years, as appears in 21 H. 7. fo. 17. and 5 Rep. 84. Perryman's case touching such particular customs. 3 Bullt. 215. Mich. 14 Jac. in a nota, in the case of Rosewell v. Welch.

(E. 2) Devisable by Custom. Pleadings.

See F. N. B. 198. (L) to 201. (D) the writ ex gravi querela.

1. WHERE land is devisable by custom, the writ of *ex gravi querela* is not incident to it, unless the custom be so; for in some villis the custom is, that the devisee may enter; and in some villis, that he shall be put in seisin by the bailly; and in some villis, that he shall have suit, by *ex gravi querela*; per Thorp. But *Knivet* in a contrary opinion; therefore when a man pleads a recovery in such vill, it seems that he ought to allege the custom to be that a man may have *ex gravi querela* in this vill upon a devise there. Br. Devise, pl. 43. cites 39 Aff. 6.

2. In *assise* the tenant pleaded in bar, and the plaintiff made title, that all the lands of the part of the south of the same vill, of which part those tenements are, have been devisable time out of mind, and that J. H. was seised in fee, and on his death-bed devised the same tenements to one E. and his heirs in fee who was seised and devised to J. N. chaplain in fee, who infeoffed the plaintiff, who was seised and disseised, &c. Cand. demanded judgment, because it is alleged that the tenements of the south part are devisable, and does not say that they were parcel of any fee or of a borough which has such custom, and the vill above is at common law, where, of common intent, parcel

[53]

of a vill cannot be of other condition than the gross is. Belk. said, we have shewn that this is by custom before time of memory, but Cand. said, parcel of a manor cannot by intendment be devisable, where the whole is not devisable and where a vill is guildable, a man cannot prescribe that one house, parcel of the vill, is devisable, so one house in B. cannot be gavelkind and departable, where the rest of the vill is otherwise; quod Finch. concessit, and Thorp similiter, by which Belk. said, that this part of the vill was of the fee of H. C. and in ancient time was a vill merchant, which time out of mind has been devisable; &c. per Thorp this is not of record, and the justices were in opinion to have given judgment against the plaintiff, by which he was nonsuited, quod nota, and per Cand. all the ancient boroughs of England appear in the Exchequer of record. Br. Customs, pl. 7. cites 40. Aff. 27.

Br. Devise,
pl. 20. cites
S. C.

3. In assise, the tenant said that *W.* was seised and died seised, and he entered as heir, the plaintiff said, that *W.* was seised in fee, and that the vill of Ludlow where the land lies, is inclosed with walls, and time out of mind has been a borough, and all the lands purchased there have been devisable time out of mind, and that *W.* purchased the same land, and on his death-bed devised it to the plaintiff, and died by which the plaintiff was seised and disseised, &c. per Belk. because he does not allege a record to prove it a borough, nor that they have held plea as a borough, by *ex gravi querela*, and said, that they have been taxed to the fifteenth as a vill of upland, and so is a vill of upland not ruled as a borough, and therefore cannot be devised. Cand. ad idem, where lands are devised he shall plead that they are impleaded in the same vill by *ex gravi querela*; and the writ shall say *quod omnes possint legare tenementa sua tanquam catalla*, and so it is not alleged here, nor has he alleged that the land is parcel of any grand fee which has such usage; and after the opinion of the justices was against the plaintiff, and therefore he was nonsuited. Br. Customs, pl. 38. cites 40 Aff. 41.

4. *A.* seised of gavelkind land in fee, holden in socage, and of other land in capite, by will in writing devised his copyhold land to his base son and the heirs of his body; whether the lands in gavelkind holden in socage were devisable by custom, was the point. A case was shewn where all the court of C. B. was agreed. Mich. 41 & 42 Eliz. that they were devisable by custom, but then this custom must be pleaded, that the lands so devised were holden in socage; for although the court shall take conuſance of the custom of gavelkind in Kent without pleading it, yet of this special custom to devise, or that the lands are holden in socage, they ought not to take conuſance of them without special pleading of the custom. And afterwards the jury going from the bar to consider of the matter in the principal case, *sedente curia*, the plaintiff was nonsuited. Cro. C. 561, 562. pl. 6. Mich. 15 Car. 2. B. R. *Launder v. Brooks*.

(F) Devise by Custom ; What Estates.

[Or what Estates are devisable in respect of the Estate of devisor.]

[1. *TENANT* in tail to him, and the heirs of his body with the reversion expectant in fee, cannot devise the land in fee to another, though he dies without issue. 31. Aff. 3. adjudged. *Quære rationem.*]

to C. his daughter in tail, the remainder to his right heirs, and died ; C. took baron, and devised to her baron in fee, and died without issue ; the baron took other feme, and devised to his feme for life, the remainder to two others, and died, the sister of A. the first devisor entered upon the second feme, and the brought assize ; and it was awarded that she take nothing by her writ ; because the feme who devised had no power to devise to the damage of him in remainder. Brook says quære thereof ; for the remainder in fee expectant upon the tail was in the same feme when her sister was dead ; and the devise cannot take effect till after the death of the devisor, as appears elsewhere. — Fitzh. Devise, pl. 15. cites S. C.

[2. If an estate be given to baron and feme, and the heirs of their two bodies, the remainder to the right heir of the baron, the baron may devise this remainder to the feme. 27 Aff. 60. Curia.]

baron entered, and was ousted, and brought assize, and was barred ; for the fee is vested in the feme, and the frank-tenement merged ; for she was tenant in tail after possibility of issue extinct. Br. Devise, pl. 42. cites S. C. — Br. Assize, pl. 275. cites S. C. — Fitzh. Assize, pl. 259. cites S. C. and says that the entry of the baron could not be adjudged otherwise than an abatement.

3. A devise by *cestuy que trust* in tail in trust is good without any further act to bar the intail in tail ; per Ld. Keeper. Chan. Prec. 228 Hill. 1703. in case of Woolnough v. Woolnough.

(G) What Person may devise.

[1. *A Feme covert* cannot devise to her husband. Con. 3 Aff. 3. admitted ; but Brook, Devise 18. makes a quære thereof.]

tit. Baron and feme (R. a). And see ibid. (Q. a). For it may be by coercion of the baron ; but the baron may devise to his feme ; for the devise cannot take effect till after the death of the devisor. Br. Devise, pl. 18. cites 31 Aff. 3. — Fitzh. Devise, pl. 15. cites S. C. — And it seems that Roll is misprinted (3) instead of (31).

[2. A feme covert cannot devise any thing that belongs to her husband without the assent of her husband.]

[3. With this agrees the law of Scotland. Skene Regiam Majestatem, 53. 7.]

[4. [But] if a feme covert makes a will, and devises goods to another, and the baron after her death delivers the goods accordingly to the devisee, this shall bind him. 26 Ed. 3. 71. admitted by issue.]

by her will makes an executor, who proves the will, and after the probate the husband delivers the goods

Br. Devise, pl. 18. cites S. C. thus : in assize A. was seised, and devised

[54] The baron died without issue, and the heir of the

In what cases wills made by feme coverts are good. See

Fitzh. Devise, pl. 31. cites S. C.

— If the

goods devised unto the executor, now he has made the will good, notwithstanding he was not privy to the making thereof; and yet a colourable argument may be made why it should not be good, by this delivery of the goods made by the husband, &c. For in so much as the wife had not leave of her husband to make a will, it is void, &c. But it cannot be said void, for that it is proved. And also it shall be intended, that by the delivery of the goods by the husband unto the executors of the wife according to the will, that he did at the first assent unto the making of the will, and such leave or assent is sufficient by word, &c. *Perk. S. 501.*—*Per North. Mod. 211. Pasch. 28 Car. 2. C. B.* the property in such case passes from the husband to the legatee, and it is his gift.

5. A *feme covert* devises lands and publisheth the will, and then the husband dies, and after she dies; this is void. So it is of an *infant* though he dies after he comes of full age; but perhaps if they new publish the will it will make it good. *Plow. Com. 344. a. Trin. 10 Eliz.*

6. A *woman* *frised* of land *marries with her brother*, and after makes a will of it, this is not good; the same law of a woman professed who takes husband. *Dyer's reading on the statute of wills, 2. cap. 1. l. 9.*

7. The husband and wife are divorced by reason of a pre-contract, at the suit of the husband, the woman *sues an appeal*, the which depending, she makes a will of her land and dies; this is good. *Dyer's reading on the statute of wills, 2. cap. 1. l. 13.*

8. A man *speechless*, lying at the point of death, may make a will by signs. *Dyer's reading on the statute of wills, 3. cap. 1. l. 15.*

[55] 9. A man who has a wife not divorced, takes another wife who is an *inheretrix*, she cannot make a will. *Dyer's reading on the statute of wills. 3. cap. 1. l. 17.*

10. A mad or lunatick person cannot, during the time of the infanity of his mind, make a testament of lands or goods, but if during his lucid intervals he make a testament and it will be good. *Swinb. cap. 2. l. 3. 1st part and 3d part.*

11. So an idiot, or one that cannot number 20, or tell what age he is of, or the like, cannot make a testament; and albeit he make a wife, rational, and sensible will, it is void. *Swinb. 71. Part. 2. l. 4. (1) 72. (5) 74. (7)*

12. So an old man, that by reason of his great age is become childish again, or so forgetful, that he doth forget his own name, cannot make a testament. *Swinb. 74. Part. 2. l. 5. (1) (2)*

13. So it is as it seems of a will made by a man that is so excessive drunk, that he is deprived of the use of his reason and understanding; otherwise if his understanding be obscured and his memory troubled, yet may he make a testament. *Swinb. 75. Part. 2. l. 6. (1)*

14. A man that is deaf and dumb by nature, cannot make a testament, unless it appears by sufficient arguments that he understands what a testament means, and that he has a desire to make a testament, for in such case he may by signs and tokens declare his testament. *Swinb. 86. Part 2. l. 10. (2)*

15. But a man that is so by accident may by writing or signs make a testament; but if he be not able to write, then he is in the

the same case with those that are deaf and dumb by nature, viz. if he has understanding he may make it by signs, otherwise not at all. Swinb. 86, 87. Part 2. f. 10. (2)

16. So may a man, that is *only deaf and not dumb*; and such as are *dumb and not deaf*, may write their own testaments if they can, or make them by good and sufficient signs. Swinb. 87. Part 2. f. 10. (3) (4)

17. An alien horn may make a will and executors, and be an executor, and sue as an executor, if he be an alien *friend* and *not an alien enemy*. Swinb. 358. Part 5. S. 13. cites in Marg. 3 Eliz. Palfatius's case.

An alien purchases land in fee, and makes a will, and after the

king makes him a denizen, after he dies, this is good. Dyer's reading on the statute of wills. 3. cap. 1. f. 14.

18. If there be a *custom, that all lands and tenements within such a precinct, &c. are devisable by all manner of persons, which are of the age of fifteen, or above such age*. A devise made of lands and tenements by one of such age is good. But if a man seised of such lands and tenements in fee, and thereof does infeoff a stranger unto his use, and his heirs and dies, and his heir being of the age of fifteen years makes his will, and devises the same land given in use to him, unto a stranger in fee and dies, this devise is not good, &c. Perk. S. 504.

19. Debt on a bond conditioned, *that the wife should make a will, &c.* The defendant pleaded that his wife did not make a will; the jury found that *she made a will, &c.* and that *she was a feme covert* at the time of making it; adjudged that it is not properly a will, she being a feme covert, yet it is *a will within the intent of the condition*, and good. Cro. C. 219. pl. 5. Trin. 7. Car. B. R. Marriot v. Kingman.

Cro. F. 27. pl. 9. Pasch. 26 Eliz. C. B. Eston v. Wood. S. P. adjudged.

20. Ejectione firmæ for land in Essex, upon the demise of Elizabeth Peacock, being a trial at bar upon evidence. It was resolved, † that if one *under the age of twenty-one years makes a will, and after comes to full age, and dies without making a new publication of it*, the will is void; but if he publishes it after he is of full age, then it is a good will, and in this case it appeared that the *devisor was born 16 Feb. 1608. and made his will 14 Feb. 1624. and published it 15 Feb. 1629. and it was agreed that the publishing of it the 15 Feb. made it a good will; for he being born 16 Feb. 1608. came of age 15 Feb. 1629. for the day before he was born makes up the year. And it was agreed, if *one makes a will the same day he comes of full age* it is good; and there shall be no fractions of a day, and so it passed for the plaintiff that the will was good. MS. Rep. said to be Ld. Ch. J. Keeling's. Mich. 15 Car. 2. B. R. Herbert Turbal.

Ed. 166. pl. 17. S. C. and S. P. agreed per cur. —Raym. 84. S. C. but states it that he was within two days of 21 years of age at the making, and so the S. P. does not appear. * 6 Mod. 260, 261. S. P. cited by Holt

Ch. J. to have been adjudged accordingly, and seems to intend S. C.

† [56]

21. Outlawed persons, though not outlawed but in an *action personal*, forfeit all their goods and chattles, and therefore cannot make any testament thereof. But the outlawed for felony, forfeiting their

their lands, as well as their goods and chattles, cannot make any testament of either. Though the outlawed only in an action personal may make his testament of lands, yet not so of his goods and chattles. Godolph. Orph. Leg. 37.

22. A man *outlawed* in a personal action may make executors; for he may have debts upon contract, which are not forfeited to the king. Consequently, for the same reason administration of such a man's goods may be granted. Godolph. Orph. Leg. 38.

(H) Devise at Common Law.

To what Person.

A devise ought to be good, and to take effect at the time of the death of the devisor; and therefore if a man seised of land deviseable, devises the same lands unto the priests of a college, or of a chauntry, and there is not any such college or chauntry at the time of the death of the devisor, and afterwards such a college or chauntry is made, yet the devise is void, because the devisees are purchasers, and when a man takes lands or tenements by purchase, he ought to be of ability to take the same when it falls unto him by the purchase, or otherwise he shall not have the same, &c. Perk. S. 505.

[1.] If a man devises to the priests of a chantry, or of a college in the church of A. and dies, and at this time, there is not any chantry, or college, this devise is void, and shall not have any effect; though a chantry or college be after made there. 9 H. 6. 24. b.]

A devise made in remainder to a corporation, where there is no such, is void, though there be such a corporation made before the remainder fall. Otherwise, if the corporation be begun, but no head yet chose. Hob. 33. cites 9 H. 6. 23. and 49 E. 3.

• Fol. 610. [2. A man might have devised to an infant in ventre sa mere, though the devisor dies before the infant was born, for he was in esse in some * respect, and the freehold shall be in the heir in the mean time. Dubitatur 11 H. 6. 13.]

See the head or division infra, as to what persons may take, viz. infants en ventre sa mere.

Admitted the baron may devise to his wife Br. Devise, pl. 8. cites 44 E. 33. 3. [3. The husband may devise to his wife, though they are but one person in law, for this does not take effect till after his death. Brook title Devise, 18.]

[57] 4. If a man seised of land devisable in fee, devises the same unto J. S. for life, the remainder Ecclesie Sancti Andree in Holborn, &c. and the devisor dies, it seems the remainder is good by way of devise, but otherwise it would be by way of grant. Perk. S. 509.

5. A devise may be made to all such persons to whom a grant may be made mutatis mutandis, unless in special cases. Perk. S. 505.

(H. 2) By what Persons at Common Law.

1. **T**HE will of *cesty que use* was good that his executors shall sell the wood, or that such should have the land for 12 years, or that such should take the profits of the land till 40 s. are paid. Br. Testament, pl. 5. cites 14 H. 7. 15.

(I) To whom in respect of the Estate.

[1. **A** Devise in tail to the heir, the remainder over to another, is good. 3 H. 6. 46.] In a cui in vita, the tenant al-

ledged that he is in by descent as heir to his father, and prayed his aid, and the demandant said that the land is devisable, and the father devised it to the tenant to have to him and to the heirs of his body, the remainder over in fee, &c. to the plaintiff. It seems where the father devised to his son and heir in fee, the heir may waive the devise, and take to the descent; contra where the remainder is over ut supra; for there he can't waive it to the prejudice of him in remainder. And see Perkins that where a man devises for life the remainder over in fee and dies, and the first devisee refuses, he in remainder may enter immediately; but where a man leases for term of life, the remainder over, and the tenant for life refuses to take livery, all is void; note a diversity. Br. Devise, pl. 4. cites S. C.

2. Note, it was holden by Chomley Serjeant, Plowden, and many others, in the case of the President of Corpus Christi College in Oxford, that if the said Master or President of any such college, by his will devises any land to his college and dies, such devise is void; for at the time when the devise should take effect, the college is without a head, and so not capable of such devise; for it was then an imperfect body; and so it was holden by the justices upon good advice thereof. 4 Le. 223. pl. 357. tempore Reg. Eliz. B. R. The President of Corpus Christi College's case.

3. If a man be seised of land devisable in fee, he may devise the same land unto his executors for years, for life, in tail, or in fee, &c. Perk. S. 508.

(I. 2.) Statutes enabling to Devises.

For expostions on these statutes, see the following division.

1. 20 H. 3. cap. 2. **W**IDOWS may bequeath the crop of the ground, as well of their dowers as of other lands and tenements, saving to the lords of the fee their services.

2. 28 H. cap. 11. f. 6. In case any incumbent happens to die, and before his death hath caused any of his glebe lands to be manured and sown at his proper costs and charges, he may make and declare his testament of all the profits of the corn growing upon the said glebe lands so manured and sown.

3. 32 H. 8. cap. 1. f. 1. Every person having any manors, lands, tenements, or hereditaments, holden in socage, or of the nature

of socage-tenure (and not having any lands, &c. holden of the king by knight's-service, by socage tenure in chief, or of the nature of socage-tenure in chief, nor of any other person by knight's-service) shall have power to give, dispose, will, and devise, as well by his last will and testament in writing or otherwise, by any act or acts lawfully executed in his life, all his said manors, lands, tenements, and hereditaments at his pleasure.

4. All lands holden in socage in chief, if none by knight's-service.

5. And every person having any manors, lands, tenements, and hereditaments of estate of inheritance, holden of the king in chief by knight's-service or of the nature of knight's-service in chief, shall have power by his last will, or otherwise by any act lawfully executed in his life, to give, dispose, will, or assign two parts of the same manors, lands, &c. in three parts to be divided, or as much of the said manors, lands, &c. as shall amount to the yearly value of two parts of the same, to and for the advancement of his wife, preferment of his children, and payment of his debts, or otherwise at his will and pleasure.

6. As also of lands holden of the king by knight's-service in chief, and by knight's-service of the king and others.

7. And where lands are holden by knight's-service of any other than of the king, and other lands in socage.

8. Two thirds of lands holden only of the king by knight's-service and not in chief, and in chief of the king, and of others may be devised.

9. 34 & 35 H. 8. cap. 5. The words of estate of inheritance in 32 H. 8. shall be expounded of estates in fee simple only.

10. And every person having a sole estate, or interest in fee simple, or seised in fee simple in coparcenary or in common in fee simple of any manors, lands, tenements, rents, or other hereditaments, in possession, reversion, or remainder, or of rents and services incident to any reversion or remainder, and having no manors, lands, or tenements holden of the king, or any other by knight's-service, shall have power to give, dispose, will or devise to any person or persons, except bodies politick and corporate, by his last will and testament in writing, or by an act lawfully executed in his life, by himself solely, or by himself and others jointly, severally, or particularly, or by all those ways, as much as in him of right is or shall be all his said manors, lands, tenements, rents, or hereditaments, or any rents common, or other profits out of the same at his own will and pleasure.

11. And all persons having a sole estate or interest in fee simple, or seised in fee simple in coparcenary or in common in fee simple, of any manors, lands, &c. held of the king by knight's-service in chief, shall have power to dispose or will to any person, except bodies politick or corporate, two parts of the said manors, lands, &c. as aforesaid, at his will and pleasure, and the said will so declared shall be good for two parts of the said lands, &c. although the will be made of the whole.

12. Or holden of the king and others by knight's-service.

13. And

13. *And shall be good for two parts, though made of the whole.*

14. 12 Car. 2. cap. 24. *All tenures by knight's-service, and by socage in capite of the king, are by this act taken away and discharged, and all tenures turned into free and common socage, so that now no person lies under any restraint in the disposal of his lands, but he may devise all or any part of his lands by his last will and testament at his pleasure.* See tit. Tenures (O. 2)

15. 29 Car. 2. cap. 3. *Any estates held pur auter vie or the life of another, shall be devisable by will.*

(I. 3) What might or may be devised, &c. [59]

1. **I**F a man holds three several manors, of three several lords in chivalry, and each of equal value, he cannot make his will of two of the other manors, leaving the third manor to the heir, but of two parts of every manor; for otherwise he shall prejudice the other two lords. Br. Testament, pl. 19. cites 35 H. 8.

2. Note, for law, and by the chancellor of England and justices, that if the tenant who holds of the king in capite, in chivalry give all his land to a stranger by an act executed in his life, and dies, yet the king shall have the third part in ward, and shall have the heir in ward if he be within age, and if of full age he shall have the primer seisin of the third part, *virtute istius clausulæ in the statute 32 H. 8.*

1. *Saving to the king, wards, primer seisin, livery, &c.* by which it appears, that the intent of the act is, that the king shall have so much as if the tenant had made a will, and had died seised; but by all, after the king is served of his duty of it, the gift is good to the donee against the heir; quod nota. Br. Testament, pl. 24. cites 2 E. 6.

3. *A thing suspended* may be devised, as when husband and wife were joint-tenants of lands in fee, and the queen had a rent out of it in fee, which she gives to the husband and his heirs; the husband devises the rent and dies, it is a good devise notwithstanding the suspension. Arg. 3. Le. 154. cites D. 319. [b. pl. 16. Mich.] 15 Eliz. S. C. cited Mo. 493. — An use suspended may be devised; as if feoffees so use before

the statute of 27 H. 8. be disseised, by which disseisin the use is suspended, and afterwards during the disseisin cestuy que use by his will devises, that his feoffees shall re-enter, and then make an estate to J. S. in fee, the same is a good devise, for by that disseisin the trust and confidence reposed by cestuy que use in the feoffees is not suspended; per Wray Ch. J. Le. 257. pl. 345. 18 Eliz. B. R. in case of Manning v. Andrews.

4. *Tenant by curtesy* grants over his estate, and the grantee devises it and dies. This was held a void devise, and out of the statute of Wills. Cro. E. 58. in a note cites 17. Eliz. Delapet's case.

5. *What one has as executor* he cannot devise to another; for immediately on his death the thing is to the use of the first testator, and his executors have it as executors of the first testator and to his use. Pl. Com. 525. b. 19 Eliz. B. R. Bransby v. Grantham.

Godb. 17.
pl. 24.
Pasch. 25.
Eliz. C. B.
in case of
Mountjoy
v. Hunting-
ton. S. P.

6. If the queen grants to one and his heirs bona & catalla felonum & fugitivorum, or utlagatorum, fines, amerciaments, &c. within such a vill or manor, the grantee cannot devise these to another, nor leave them to descend for a third part, because they are not of any annual value, and therefore the statutes do not extend to them. But if a man be seised of a manor to which a leet, or waif and stray, or any other hereditament which is not of any annual value is appendant or appurtenant, there by the devise of the manor with the appurtenances those shall pass as incidents to the manor; for since the statute inables him by express words to devise the manor, it inables him consequently to devise it with all its incidents and appendants. 3 Rep. 32 b. cites it as so resolved by Anderson Ch. J. and Peryam J. of C. B. on conferences with divers other justices, Pasch. 25 Eliz. in Baker's case.

7. It hath been doubted, whether tithes are devisable by will; said per Cur. Le. 23. pl. 29. Trin. 26 Eliz. B. R. in case of Withy v. Saunders.

8. *Rent extinguished* cannot be devised. 2 And. 194, 195. Trin. 29 Eliz. in pl. 11.

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9. The words of a will were, viz. *If A. pays his money due on mortgage at Michaelmas next (that being the time of payment) then I devise that B. shall have it.* This devise of a possibility is not good; per Cur. 3 Le. 195. in pl. 244. Hill. 29 Eliz. C. B. and denied the case cited by Fenner of 12 E. 2. Fitzh. Condition. 9. where such devise held good.

Poph. 89,
90. S. C. ac-
cordingly.
— 3 Rep.
25. S. C. —
And. 348
S. C.

10. Lands in H. were jointured on the wife. The husband in consideration she would waive her jointure in H. devised to her the manor of T. for her life. She agreed to the devise. Resolved by the greater part of the justices in Cam. Scacc. that the leaving the jointure made an immediate descent by relation to the heir, and the deviser was not such a person having lands as could dispose of it according to the statute. Mo. 254, 255. pl. 401. Mich. 29 & 30 Eliz. Butler v. Baker.

Cro. E.
359. pl. 19.
Cleer v.
Peacock.
S. C. held
according-
ly.

11. A devise of an *advowson in gross* is void, because it is of annual value, whereof the king shall have the third part; per Anderson Ch. J. but the other three J. held e contra, and so it was adjudged. Ow. 24 Mich. 33 & 34 Eliz. in Cleer's case.

12. If a man hath an *hundred*, together with *felon's goods, fines, amerciaments, &c.* and such *casual hereditaments*, they may be devised by the acts of wills of 32 & 34 H. 8. 3 Rep. 33. a. Mich. 33 & 34 Eliz. B. R. by the reporter in the case of Butler v. Baker.

13. *Tenant in capite of three messuages, of two in fee, and of one in tail, all being held in capite, and devised all his messuages to a stranger; it was holden that the devise was good within 32 H. 8. for the two manors which he held in fee, and void for the third.* For he being tenant in tail of the third manor, and that descending to his issue is a sufficient performance of the statute of 32 H. 8. and the intent of it satisfied. Cro. E. 286. pl. 3. Trin. 34 Eliz. B. R. Jernengham v. Cornwallis.

* Abr. Equ.
case 172. pl.
5. cites 31

14. *Liberties appendant* to land are devisable as those which are arising out of the land. A *reversion* on an entail, whereto no rent

rent is annexed, is devisable, yet it is not of any annual value. *Aff. 3. adjudged that tenant in*
 Cro. E. 369 Mich. 36 & 37 Eliz. C. in case of Cleer v. Peacock.
 tail to him and the heirs of his body with the reversion expectant in fee, cannot devise the land in fee to another, though he dies without issue. And *ibid. marg.* gives the reason, because at common law it was only a possibility, and not grantable or deviseable, but whether such a reversion could be devised by parol within the custom, see *Styl. 409, 410. dubitatur*; and there said that the statute of West. 2. helped not the custom.

15. Where a man hath a rent out of lands to him and to his heirs during the life of another, he cannot devise this rent, either at common law, or by the statutes 32 & 34 H. 8. of Wills, because he is not seised of an absolute estate in fee, but only during the life of another; and the statutes require that the testator should be seised of an absolute estate in fee. Court divided and so no judgment. *Mo. 625. pl. 858. S. C. that he may devise it by the stat. per 2 J. against Popham.*
 Cro. E. 804. pl. 5. Hill. 43 Eliz. B. R. Gawen v. Ramts. *Popham said that this case*

had been put to the justices at Serjeant's Inn in Fleet-Street, and many of them were of opinion, it was not deviseable. Et adjournatur. Cro. E. 805. S. C.

16. The ancient jewels of the crown are heir-looms and shall descend to the next successor and are not devisable by testament. Co Litt. 18. b.

17. If a man be seised of a house and possessed of divers heir-looms, that by custom have gone with the house from heir to heir, and by his will deviseth away these heir-looms, this devise is void; for the will takes effect after his death, and by his death the heir-looms by ancient custom are vested in the heir, and the law prefers the custom before the devise; and so it is if the lord ought to have a herriot against his tenant, and the tenant devises away all his goods, yet the lord shall have his herriot for the reason aforesaid. Co, Litt. 185. b.

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18. An incumbent seised in fee of an advowson devised the next presentation, viz. that his executors, two, three, or any one of them should present J. S. when the church should become void; though the church becomes not void but by the death of the devisor, this is a good devise for though the will has no effect but by the death of the devisor, yet it has an inception in his life time, and this shall make it good. 3 Bullst. 42, 43. Trin. 13 Jac. by Dodderidge J. in case of Harris v. Austin.

Roll. Rep. 214. S. C. — Cro. J. 371. Pynchon v. Harris S. C.

19. A naked possibility cannot be devised, but an interest though it be in contingency, may; agreed; per Cur. 2 Roll. Rep. 129. Mich. 17 Jac. B. R. in the case of Child v. Bailly.

20. Copyholds are not deviseable by will within the 32 H. 8. of wills; agreed; 2 Roll. Rep. 383. Mich. 21 Jac. B. R. in the case of Royden v. Malster.

21. In some cases a man may devise a right of entry, as Termor devised his term is ousted and died, the executors enter now the devise is good. Arg. 2 Roll. Rep. 426. Hill. 21 Jac. B. R. in the serjeant's case,

So where he has right as termor was ousted at the time of his devising it, Ibid.

and before regrefs dies, if executor enters or recovers the term, the devise is good.

22. If A. devises a term to B. and dies, and B. devises it to C. and dies, and the executor of A. agrees to the first devise, the devise is good,

A. had a term for a 1000 years

and devised it to B. for life, remainder to C. and made D. executor; C. devised his interest to J. S. the question was thereupon, Whether this term, if not assented to by the executor, and which passed only as an executory devise, could pass by the will of C. the devisee? and held that it was only a possibility, and that nothing passed, per Holt C. J. who cited Mar. 137. Southward v. Millward. — And Holt said that the executor must assent to a legacy, else nothing passes in the case of a term. 11 Mod. 127. Trin. 6 Ann B. R. in case of Brunker v. Cook.

Though a chose en action cannot be transferred over nor devised yet a contract which arises from an interest in land, or

23. A chose en action may be devised; as if A. is in debt by bond to B. in 100l. and B. devises the 100l. to C. when the executors have recovered against A. they shall pay it to C. and C. shall have no other 100l. but this; so if mortgagee devises that C. shall have the money that mortgagor owes him, and afterwards the mortgagor pays the money to the executors, they shall be compelled to pay it to C. Arg. 2 Roll. R. 426. Hill. 21 Jac. B. R. in the Serjeant's case.

which is an interest may be well transferred over; per Popham. Cro. E. 638. in case of Ards v. Watkins. — Testator cannot effectually devise debts owing to him, for, if he does, the suit for them must be in the executor's name, and so must the release or acquittance for them, and not in the legatee's name. But when they are received (if there are no debts to pay) the executor ought to deliver them to the party to whom the bequest is, and is compellable to do it in court of conscience, or in the spiritual court, and in such sense a bequest of money payable on mortgage is good, but not otherwise. Wentw. Off. of Executors 18.

24. Where a man has a joint-interest in chattels devisable, &c. at the time of his death, a devise made thereof is nothing worth, causa patet. And where such chattels are annexed unto the freehold or inheritance, so as they cannot be severed from the same by him, who has property in them; then a devise made by him, who has property in them is not good. Perk. f. 526.

Co. Litt. 351. a. S. P. — S. P. 25. Term in right of the wife is not deviseable by the husband by his will, though he may dispose of it in his life-time. Cro. C. 344.

345. Hill. 9 Car. B. R. cites the case of Branfby v. Grantham, Pl. C. 523.

by extent, &c. in right of his wife, or has the next avoidance of a church in her right, he cannot by will bequeath any of these. Wentw. Off. Executors, 18, 19.

[62] 26. Estate by stopple, as to the devisor and devisee, shall be held as an estate, and shall pass between them as an estate by the devise within the statute 32 H. 8. per Jones J. Jo. 457. Trin. 16 Car. B. R. And to this purpose he cited 4 Rep. 53. a.

27. He that has a possibility of a term after the death of another may devise it; decreed. Pollex. 44. 16 May, 16 Car. 1. Veizy v. Pinwell.

11 Mod. 28. A devise of a lease for years to A. S. during his life, remainder to J. H. who makes his will and devises the same, and dies; this is void, for it being but a possibility it cannot be devised, and after the death of A. B. it shall go to the executors of J. H. Mar. 137. pl. 209. Mich. 17 Car. Southward v. Millward.

127. Trin. 6 Ann B. R. Holt Ch. J. cites S. C. as held, that it was only a possibility, and that nothing passed by the will; and said that it is hard to imagine such a preposterous thing, that he could dispose of a term, which was not his but another man's; but said he should give no positive opinion therein, it not being the present case.

29. Two jointenants, and to the heir of one of them he that has the reversion

reversion cannot devise it; per Windham. Twisden J. said; that there had been opinions both ways, and that it had often been a question. Raym. 40. Mich. 13 Car. 2. B. R.

30. *A portion was settled by deed of A. on B. and C. his children, as should be unmarried or not provided for at the time of the said A's decease, at their respective ages of twenty-one. B. was married to M. and had some allowance for maintenance made him by A. viz. 30l. a year paid to B. during the said B's life, and afterwards to M. so long as A. lived. B. devised his portion to M. his wife, whom B. made his executrix. Decreed the portion to M. Ch. Rep. 254-17 Car. 2. Corbet v. Morris.*

31. *An estate descendible and determinable upon the death of tenant in tail, is not devisable within 32 H. 8. & 34 H. 8. But estates of inheritance within that statute are estates of fee-simple only. Saund. 261. Pasch. 21 Car. 2. in case of Took v. Glascock.*

Lands in tail are not devisable by will. Co. Litt. 111. a.—1.

Salk. 619. pl. 2. Pasch. 22 W. 3. Holt. Ch. J. in case of Machil v. Clark, cited SKYMOUR'S CASE, that where a tenant in tail bargained and sold, the bargainee has a descendable fee and held this case for law, but denied the case of Took and Glascock; Saund. 260. and likewise Litt. S. 612. if be taken literally.

32. *The money of an orphan of London not recovered by the husband before his death, is not devisable by the husband; decreed. per Bridgman K. & al. 2 Vent. 341. Mich. 22 Car. 2. in Canc. Pheasant v. Pheasant.*

Chan. Cases 181 S. C.

33. *An Interest in a trust is in equity assignable or devisable. 1 Chan. Cases 211. Trin. 23 Car. 2. per Wild J. and agreed by Rainsford and the master of the rolls in the case of Cornbury v. Middleton.*

34. *Breach of an agreement is a chose en action and not devisable; Arg. Chan. Cases 208. And by Windham J. and Ld. Keeper accordingly, Ibid. 209. Trin. 23 Car. 2. Cornbury v. Middleton.*

35. *The court said, that the statute of Wills 32 H. 8. cap. 1. had begotten more debates, suits, and troubles than it remedied, and was of greater mischief than the common-law. 3 Keb. 450. pl. 14. Pasch. 27 Car. 2. B. R. in case of Gunton v. Andrews.*

36. *If the estate of the devisor be turned to a right at the time of his death, the will cannot operate upon it; per Ellis J. Mod. 217. Trin. 28 Car. 2. C. B.*

37. *Ld. Chancellor said he cannot tell, but before the statute, if a mortgagee before the condition broken had made a devise, &c. it is void; for a condition is not devisable, but after forfeiture the equity of redemption is devisable. 2 Chan. Cases. 8 Mich. 31 Car. 2. Anon.*

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38. *A devise of a chattle real in gross is good, if the circumstances about nuncupative wills set down in 29 Car. 2. cap. 3. be observed. Sed e contra where a lease, &c. is ordered to attend the inheritance. 2 Canc. Cases. 49. 55. Hill. and Trin. 33 Car. 2. Tiffin v. Tiffin.*

39. *Lands are settled on marriage, and a term raised for daughters' fortunes; the only child is a daughter, on whom the fee descends; she dies an infant and indebted, and devised away the portion charged*

on the estate; her heirs insisted the term was merged in the daughter, as being also heir at law. Master of the Rolls decreed the portion to go according to the will of the daughter, and so relieved against the merger. 2 Vern. R. 90. pl. 86. Mich. 1688. Powell v. Morgan.

40. Land settled by a voluntary settlement cannot afterwards be devised by will of the same person, though for payment of his debts. Vern. 464. pl. 444. Trin. 1687. Bale v. Newton.

41. A. having remainder in tail with reversion in fee devised to one son in tail, remainder to the other in fee; it is good, because it alters the tenure. 1 Salk. 233. pl. 11. Trin. 9 W. 3. B. R. Badger v. Lloyd.

42. J. S. who was to have had a considerable advantage by a will, was drawn in by fraud and false suggestions, to make a composition for his interest, and to give a release; Afterwards J. S. being sensible of the fraud makes his will, and thereby (after other legacies) he devises all the rest of his goods and chatties whatsoever, to his wife, upon condition, that she paid all his debts, and made her sole executrix; and it was held, that his right to set aside the release was devisable, and the words proper for that purpose. Decreed. Trin. 1701. Abr. Equ. Cases 175, 176. Trin. 1701. Drew v. Merry.

43. Disseisee devised, and after re-enters, the devise is good, because by the entry he was seized ab initio, so as he might bring trespass; Arg. quod fuit concessum. 1 Salk. 237. Mich. 6 Ann. B. R. in case of Bunter v. Cooke.

44. A. devises his manor and before his decease a tenancy *escheats* and after the testator dies. The question is, whether the *escheated* tenancy shall pass, because the manor is devised and that is part of it, for this tenancy is not devised as a distinct thing, but as a part of the whole which he could devise; Per Holt Ch. J. Gibb. 231. Mich. 6 Ann. B. R. in case of — Bunter v. Cook.

11 Mod.
129. S. P.
in S. C.
by Holt.
Ch. J. —

It was admitted that it should pass. 1. Salk. 238. in case of Bunter v. Coke.

11 Mod.
129. S. P.
by Holt
Ch. J. in S.
C. and that
so it is of

lands in reversion expectant on an estate tail, and before his death, the tenant in tail dies without issue, these lands will pass though a reversion only at the time of making the will; because he is seized at the time as much as he can be; and it is a certain present interest, though to commence in futuro, and all the estate he could give he intended him. — Gibb. 231. S. C. and S. P. by Holt Ch. J. — 1 Salk. 237. pl. 16. S. C. & S. P. agreed per Cur.

Ch. Prec.
320. S. C.

46. An equitable interest is as well devisable by will, as a legal estate. 2 Vern. R. 680. Hill. 1711. Greenhill v. Greenhill.

47. A future interest is devisable. Per Cur. 2 Vern. 679. Hill. 1711. Greenhill v. Greenhill.

48. Though a condition be not in strickness of law devisable, yet since the statute of Uses, the devisee may take benefit of it by an

an equitable construction of that statute; per Master of the Rolls and Ld. Chancellor. Mich. 1718. Ch. Prec. 487. Pasch. 1718. *Markes v. Markes*.

49. Though the father may by will dispose of the *guardianship of a child* till twenty-one; yet though a child be a *lunatick* he cannot dispose of the guardianship of such child, if *above the age of twenty-one*. Per Lord C. King. 2 Wm's Rep. (638) Mich. 1731. Ex parte Ludlow.

(I. 4) New acquired lands. Pass in what Cases.

1. **I**F a man devise *certain lands, as the manor of D. or Whiteacre, and has nothing in it* at the time of making his will: but he purchases them afterwards, they shall pass to the devisee, because it shall be taken his intent was to purchase them, and if they shall not pass, the will is void to all intents. Arg. Pl. C. 344. a. Trin. 10 Eliz. per Lovelace serjeant, in the case of *Brett v. Rigden*.
 Holt. Ch. J. in the debate of the case of *Brunker v. Coke*, held strongly of opinion with this of serjeant Lovelace, but when he came to deliver the opinion of the court he held it not to be law, and held that 39 H. 6. 18. b. Br. Devise, 15. does not warrant that opinion, (to which Powell J. who likewise held otherwise before, now agreed) Holt's Rep. 247. *Brunker v. Cook*.—7 Mod. 127, 128, S. C. cited and remarked upon by Holt Ch. J. accordingly.

2. Devise of lands, in which devisor has nothing, and after he purchases the land, this is no devise within the statute of wills. Mo. 255. pl. 401. Mich. 29 & 30 Eliz. in case of *Butler v. Baker*.

3. In an ejectione firmæ for lands in Westminster it was said by all the justices to the jury, that if a man hath a lease, and disposeth of it by his will, and after surrenders it and takes a new lease, and after dies, that the devisee shall not have this last lease, because this was a plain countermand of his will. Goldf. 93. pl. 6. Trin. 30 Eliz. *Asbby v. Laver*.
 S. C. cited per Holt Ch. J. Holt's Rep. 247. in case of *Brunker v. Coke*.

4. B. seized of the manors of H. and T. and Prior's land, hath issue W. T. L. and R. W. marries E. afterwards the father makes a feoffment of H. to the use of the son and the wife in tail for the jointure of the wife and dies; the reversion of H. with the other lands descend to the eldest son, who devises the manor of T. to his wife for her jointure in recompence of dower and jointure in the other lands, with divers remainders over to his brothers and dies, having issue G. These lands were held in capite. The wife refuses her jointure en pais, and enters into T. held here that her refusal shall have relation only as to H. and not to the manor of T. and the will here shall take effect at the time of his death, so it shall remain as to the heir, and the refusal of the wife shall not make good the will for a third part, which was void when the devise took effect (viz.) at the time of the death of the devisor. But upon the statutes of wills it was held, that after the 27 H. 8. and before 32 & 34 H. 8. the manor of T. was not devisable, and W. B. having not pursued the power given him by the statutes of 32 & 34 H. 8. it was resolved that the will was void for part of the manor of T. (1ft),
 Every
 Mo. 254. pl. 401. S. C. agreed d. 348. pl. 322. S. C. agreed by the greater part of the judges and says that of the same opinion were Wray Ch. J. and Manwood in their lives—Popn. 87. S. C. resolved by the greater part—See the case of

Bunter
v. Coke
Resolved
according
to this opi-
nion. Hill.
5 Ann.
Pasch. 6
Ann. and
Mich. 6
Ann. in
which term
judgment
was given
in B. R. and
C. B. ut su-
pra, upon
special ver-
dicts in two
ejectments,
and affir-
med after-
wards in
Dom. Proc.
upon a
writ of
error.

¶ [65]

Every person who had a power of devising, must be a person *having*, which imports two things, ownership, and the time of ownership, for he ought to have the land at the time of making his will, and then the statute gives him a power to dispose of the two parts which he had; but in this case the devisor has not the manor of H. for he and his wife were joint tenants thereof during the coverture; so that he himself had it not; and to every will there are two things requisite, the writing, and the death of the devisor; but in this case neither * the commencement or the end of it was full and perfect; for at the time of the writing and the death, he had no power in respect of the joint-estate of H. to dispose of the manor of T, and by the death H. survives to the wife, and part of T. presently descends to the heir. (2dly,) The testator ought to have a sole estate, as well in the land which he leaves to descend to his heir; as in the land which he devises, but here at the time of making his will, and at the time of his death he had a joint-estate with his wife, to which she could not agree during the coverture, wherefore the testator had a power to dispose of but two third parts of that whereof he was sole seised, either at the time of making his will, or at least at the time of his death. (3dly,) The statutes give a liberty to dispose of two third parts of, &c. but what he cannot dispose by some act executed in his life-time, this shall not be taken for any of, &c. whereof he may dispose two parts by authority of this act; but in this case he could not make any disposition of the manor of H. but only during the coverture. (4thly,) The statute intended the lord should have an equal if not a greater benefit for his third part, as the devisee should have for his two parts, but in this case the devisee would have two parts absolutely, and the king but a possibility for his third part, if so be that the wife should disagree thereto, which would make the king in a worse condition than the devisee; for the wife may or may not refuse, and no time is fixed for her refusal. (5thly,) The third part ought to descend immediately, without a mean time, but here it survives to the wife, and part of T. descends to the heir, which ought not to be devested out of the heir by any subsequent agreement. If a man be seised of three acres by knight-service in capite and makes a lease of one of the acres for life, and then devises the two acres and dies; this devise is void for a third part of the two acres. 3 Rep. 25. a. to 37. a. Mich. 33 & 34 Eliz. B. R. Butler v. Baker.

5. A man devised all his lands in A. and afterwards purchased lands in the same town, and afterwards one comes to him to take a lease of this land newly purchased, which the testator refused to let, and said that these lands newly purchased should go as his other lands; and upon his death-bed adds a codicil to his will, but says nothing of his purchased lands, and adjudged that the purchased lands shall pass. 2 Brownl. 74, 75. cited as adjudged Trin. 37 Eliz. Bedford v. Vernam.

6. Termor devises his term to B. and then mortgages it, and redeems it and dies; B. shall have the residue. D. 143. b. pl. 55. Marg. cites 40 & 41 Eliz. B. R. Howe's Case.

7. A.

7. A. devises land, and then *aliens and repurchases it* and dies. Per Walth J. The *devisee* shall have it. D. 143. b. Marg. pl. 55. cites 40 & 41 Eliz. B. R. Hewit's case.

8. *Lands were contracted to be purchased*, but before the conveyance was made the purchaser died, having devised the land, &c. per Cur. The devise is good, because the vendor after the contract stood trustee for the vendee. Chan. Cafes. 39. Trin. 15 Car. 2. Davie v. Beardsham, and cites it so ruled about 1657. in lady Fohaine's case.

admittance, and devised them by his will. N. Ch. R. 76. Mich. 13 Car. 2. Davie v. Beversham. S. C. ——— 3 Chan. Rep. 4. 5. S. C. and cites 1651. lady Foham's case. ——— N. Chan. Rep. 77. cites 1651. Lady Foliamb's case, ruled accordingly.

9. If a man devises all his lands for payment of his debts, and *purchases lands afterwards*, Lord Keeper said he would decree a sale though there were no precedent articles. 2 Chan. Cafes. 144. Trin. 35 Car. 2. Prideaux v. Gibben.

10. If a man devises *a term for years which he had not at the time of the devise*, but purchased some time before his death, Holt, Ch. J. in *delivering the opinion of the court in case of Brunker (alias Bunter) v. Cook, said he doubted very much whether it would be good. Suppose for the purpose, one takes a college lease, and another makes his will, and should devise that lease away to another, and afterwards the testator should purchase that college land, subsequent to the making of his will, the question is whether this would be a good devise? and said he was inclined to think this would not be a good devise. 11 Mod. 126. Trin. 6 Ann.

the doubt the court of B. R. seems to have been in in that case, whether a lease for years would pass by a will made before the purchasing thereof, it has been clearly held to pass by such will.

11. A man *devises all his land in tail*, and afterwards *purchases other lands*, and *dies without republication*, those purchased lands will not pass; but if he republishes the will in such manner, and with such circumstances, as are necessary to compleat execution of an original will, then the purchased lands will pass as by an original will; Per Holt Ch. J. in delivering the opinion of the court. 11 Mod. 127. Trin. 6 Ann. B. R. in case of Brunker v. Cook.

12. Holt Ch. J. doubted much if *a chattel real purchased after the will made* will pass by the will. Gibb. 228, 6 Ann. B. R. in case of Brunker v. Coke,

S. P. doubted per cur. ——— Ld. Ch. Parker said, that leases which the testator had at his death, though not at the time of making his will, shall pass by the will. Wm's Rep. 575. Mich. 1719. in case of Wind v. Jekyl and Albone.

13. Holt Ch. J. in delivering the opinion of the court said, that 16 Car. 2. Bridgman being chief justice, took notice, that Coke in the case of Butler and Baker, lays a great stress upon the word (*having*) but Bridgman said, he did not take it, that it does depend so much on the word (*having*) as on the *nature of the thing*, and there all the judges of the Exchequer Chamber agreed with him, and Holt said, that here judgment ought to be for the defendant. 1st, Because a will is a will from the making, unless it be

revoked.

These were copyhold lands, and the purchaser died after surrender, but before Beversham.

S. C. cited 10 Mod. 529. Mich. 10 Gen. 3, in Cane.

Gibb. 228. S. C. & S. P. greatly doubted by Holt. Ch. J. if good or not ——— 3 Wm's Rep. 169. in a note cites S. C. and says, that notwithstanding

* [66]

1 Salk. 238. Mich. 6 Ann. B. R. the S. C. &

Powel J. said, that when this case came first to be argued he thought the will might be good, but that he had since

searched the books, and said he cannot find one case to confirm that opinion;

for they all agree that a man must be owner of the land at the time of making his will. *Holt's Rep. 253. Bokenham v. Cook. S. C.*

Geo. E. 493. Beckford v. Barnetot. S. P. But dubitatur per omnes, præter Fenner, who thought it would.—S. P. but no judgment, 8 Mod. 220. Pocklington v. Hatton.

14. A *codicil, which concerns only personal legacies* will not amount to a republication of the will so as to pass land purchased after the making of the will. *2 Vern. 625. Mich. 1708. Litton Strode v. Falkland.*

2 Ch. Rep. 189. Trin. 7 Ann. S. C.

15. *Equity of redemption of mortgaged lands foreclosed or released after the making the will* do not pass by a devise of all his lands. *Mich. 1708. 2. Vern. R. 625. Litton Strode v. Russell & al'.*

S. C. cited and admitted by the master of the rolls, but took

a difference where the purchase was before the will made, and where after, for in the last case testator had no equitable interest in the land, and so having no title could devise nothing. *3 Wm's Rep. (631.) Trin. 1731. Langford v. Pitt.*

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2 Vern. 679. pl. 604. S. C. decreed and confirmed on a rehearing.—Gilb. Equ. Rep. 77. S. C. in totidem verbis with Chan. Prec.

17. *A. contracted for the purchase of land in trust for B. the money to be paid, possession to be delivered, and conveyances to be executed four months after. In the mean time B. made his will and devised all his personal estate to be sold, and the money to be laid out in land and settled together with his freehold estate on J. S. and devises to him and his heirs all his lands of inheritance, having no lands but those contracted for, part of which were customary. The conveyances were afterwards executed, and then B. died, but without republication of his will. Decreed first per Ld. Cowper, and now per Ld. Harcourt, that the lands pass, and that no surrender of the customary lands was necessary, B. having only an equitable interest in them. Ch. Prec. 320. Hill. 1711. Greenhill v. Greenhill.*

18. There is a diversity betwixt the devise of a real estate and the devise of a personal estate; as if I devise all my real and personal estate, and afterwards purchase more of each kind, only the personal estate that is purchased afterwards shall pass. The reason of this difference seems to be, that with regard to the real estate bought after the making the will, supposing that not to pass, still there is one in law capable of taking it, (viz.) the heir; but as to the personal estate, if the executor, though made before the acquiring thereof, does not take it, it is uncertain who shall. Per Ld. Chancellor. *Wms's Rep. 575. Mich. 1719. in case of Wind v. Jekyl & al'*

(I. 5) What Persons may devise Emblements.

1. IF a man be *seised* of land in fee, or in fee tail, and sows the land, and devises the corn growing upon the land at the time of his death unto a stranger, it is a good devise, notwithstanding that the land is not devisable nor in use, &c. Perk. S. 512. Wentw. Off. of Executors 19. S. P.

2. But if the devisor had devised the trees growing upon the land at the time of his death, the devise as unto the trees is void, because that the heir of the devisor shall have them, and not the executors, &c. Perk. S. 512. Wentw. Off. of Executors 19. S. P.

3. If a man *seised* of land in fee, as in right of his wife, leases the same land for years unto a stranger, and the lessee sows the land, and afterwards the wife dies, the corn not being ripe; in this case the lessee may devise the corn growing upon the land, and yet his estate was certain and is determined; but a thing uncertain was the cause of the determination of his estate, &c. Perk. S. 513.

4. If tenant by the curtesy of lands or tenements for life, leases the same unto a stranger for years, and the lessor dies within the term of years, in this case, if the corn were growing upon the lands, and not ripe at the time of the death of the lessor, the lessee may well devise the same, &c. Perk. S. 514.

5. But if after the sowing the lessee for years enfeoffs a stranger, and before the, &c. and the lessor enters for a forfeiture, he shall have the corn, &c. Perk. S. 515.

6. So of a lease for years upon condition, *mutatis mutandis*, &c. Ibid.

7. And if the land be recovered against lessee for years in a writ of waste, he cannot devise the corn, notwithstanding it be growing upon the land at the time of his death, &c. Ibid.

8. And so if land be recovered against his lessor by a more ancient title, &c. But otherwise it is if a common recovery be had against his lessor, in a writ of *entre en le poist*, or in any other writ by a false and feigned title, &c. Perk. S. 515. [68]

9. If a man *seised* of land in fee thereof enfeoffs a stranger in mortgage upon payment, and not payment on the part of the lessor, at a certain day, and the feoffee sows the land, and the lessor pays the money at the day appointed, and enters, now the feoffee cannot devise the corn growing upon the land, as it is said, *Tamen quare*. Perk. S. 516.

10. If a manor be put in execution upon a statute merchant, and he who has the manor in execution, has a ward after the execution, by reason of the manor, which ward is as much worth as the debt does amount unto, he whose lands are put in execution, shall have a *scire facias* against the conseree, &c. and shall have his manor back again; but if the conseree had sowed the land, he may well devise the corn growing upon the land. Perk. S. 517.

11. And if a man be *seised* of land in right of his wife, &c. and sows the same land, and devises the corn growing upon the land, &c.

and dies before the corn be severed, the devisee shall have the corn, and not the wife, but otherwise it is of grass not severed at the time of the devisor's death, &c. Perk. S. 518.

12. If a disseisor be of land, and he sows the land; now, if the disseisee enters or recovers by a writ of assize before the corn be severed, he may devise the corn, and so may not the disseisor; but otherwise it should be if the corn be severed before his entry, or before his recovery, notwithstanding that it remains upon the land, for then the disseisor may devise the same, &c. But the law is otherwise in the same case of trees severed, which were growing upon the land, &c. Perk. S. 519.

13. And it is said, if tenant in tail of land leased the same land for life, and the lessee sows the same land, and the tenant in tail dies, and the issue in tail recovers in a formedon en le descender, before the corn is severed, the issue in tail may well devise the corn, tamen quære. Perk. S. 520.

14. If a man seised of land in fee, has issue a daughter and dies, his feme being big with child of a son, and the daughter enters and sows the land, and after the sowing and before the severance, the son is born, and one of his next friends enters for him; yet the daughter may devise the corn growing upon the land. Causa patet. Perk. S. 521.

15. But if after the sowing, and before the son is born, the mother has recovered her dower against the daughter, and the land sowed be assigned unto her by the sheriff for her dower in the allowance of other lands, now the mother may devise the corn growing upon the land, and the daughter cannot. Tamen quære. Perk. S. 521.

16. The statute of Merton cap. 2. which gives, *quod omnes vidue de cetero possint legare blada*, &c. as unto this point, is but in affirmation of the common-law; for if tenant in dower, &c. sows the land which she holds in dower, and makes her executors and dies, the corn not severed, the executors shall have the corn, notwithstanding they are not severed, by the common-law. And to be short, tenant in dower may devise the corn growing upon the land, which she holds in dower at the time of her death, by the common-law. And so was the law taken in 4 H. 3. Devise 6. which was 16 years before the making of the statute of Merton, &c. Perk. S. 522.

2 Inst. 81.
Ld. Coke
cites Fleta,
lib. 2. cap.
50. that be-
fore the
statute of
Merton the
widow
could not
dispose de
rebus &
fructibus
suis in dote
sua existen-

tibus five separati sint a solo five non, but that before they might have done it; and says, that they, who held this opinion, relied much upon the words (*de cetero*) which imply, as they say, a new law; but others held the contrary, and that for advancement of tillage, and encouragement thereunto, which is so profitable for the common wealth, and by reason of the uncertainty of her estate for life, they held opinion, that the executors or administrators of the wife should have, or she herself by her will may dispose of them, as well as any other tenant for life might do; and they vouch authority before this statute in 4 H. 3. where it is said, note that tenant in dower may devise her corn growing upon the land at the time of her death. Now, to clear this doubt, was this statute made, and (*de cetero*) may as well be applied to the clearing of a doubt heretofore, as for making a new law, and so of necessity it must be taken in this chapter for such lands and tenements, as the widow has of inheritance, &c. *quam de aliis terris et tenementis suis.* 2 Inst. 81.

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17. If two tenants in common be of lands in fee, and one of them takes a wife and dies, and his wife is endowed, &c. and she and the other tenant in common sow the land, &c. and afterwards she makes her

her executors and dies the corn not being severed, *her executors shall have the corn in common* with him who held in common with the tenant in dower. Perk. S. 523.

18. If a parson sows his *glebe*, and dies before severance; he may devise the same, because the corn should have gone to the executor. Wentw. Off. Executor. 19. See (I. 2.) pl. 2.

(I. 6) Good. And what will amount to a Devise.

1. ONE, who had feoffees seised to his use, devised by his will, that his *executors should sell the woods, &c.* Per Keble it is a void will, for it is prejudicial to the heir, contrary to Brian and Vavisor, for the statute directs, that all feoffments, gifts, &c. by cesty que use shall be good, and the same law of a will, and he may devise for years by his will, and he may devise the profits or part of them, till such a debt be paid, and therefore the will is good of the woods, which Wood and Davers agreed, Quod nota. Br. Feoffments al Uses. pl. 11. cites 14 H. 7. 14.

2. If I release all my lands to A. and his heirs, this is a good devise to A. and his heirs of those lands; by all the justices. And. 2 And. 13. Arg. S. P. — Bon. 30. pl. 50. S. P. — Arg. cited Cart. 184.

3. Where a Man had feoffees to his use before the statute of uses made anno 27 H. 8. and after the same statute, and also after the statute of 32 H. 8. of wills he willed that his feoffees make estate to W. N. and his heirs of his body and died, this is a good will and devise, by reason of the intention, &c. Br. Devise, pl. 48. cites P. 38 H. 8. per Baldwin Shelley and Mountague J. determined for law.

4. L. infeoffed B. and C. in trust to perform his will, and afterwards by his will declares, that his trustees should stand seised to the use of J. S. his daughter, who was his bastard, this is a good devise of the land by the intention of devisor. D. 323. pl. 26. Pasch. 25 Eliz. Lingen's case.

J. 3. ibid. — Though in the first case the feoffees cannot stand seised to the said use. Ibid.

5. A will made after this manner, *I have made a lease for twenty one to J. S. paying but 10 s. rent*, this is a good lease by the will; for this word (*I have*) shall be taken in the present tense as in a deed of feoffment this word (*Dedi*) shall. Mo. 31. pl. 101. Trin. 30 Eliz. Anon.

1. 2 Vent. 57. Wright v. Wywell. — 3 Lev. 259, 260. S. C. Trin. 1 W. & M. in C. B. Powell J. held according to the case in Mo. 31. pl. 101. but the other three justices contra.

6. A. devised land to his wife whom he made executrix to use at her pleasure, and requested her to pay his debts; per Anderson and Walmsley J. against Periam, the money in her hands, for which she sold the lands, are assets; but adjournatur. Le 224. pl. 306. Mich. 32 & 33 Eliz. C. B. Alexander v. Lady Gresham.

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7. A rent was devised to J. S. *cum clausula districtionis*; though *clausula districtionis* is not sufficient in a grant by deed to create a rent, yet it was adjudged good here, because it was by devise. Mo. 592. pl. 798. Trin. 40 Eliz. Kingswell v. Cawdrey.

8. Doctor Ford by his will devised certain lands to his wife in these words, (Non per viam fidei commissi) for which his son might sue her, but *hoping if his son grew thrifty, that at her death she would leave the remnant of these leases to him*; she married Greyfil; but before marriage Greyfil wrote unto her, that she should have the disposing of those leases at her death; after the marriage Greyfil sells the leases; Ford brings his suit in chancery, and had no help by the opinion of the court. Cary's Rep. 31; 32. cites 31 May. 1 Jac. 1603.

9. One may devise his estate by his last will in *such a manner as he cannot make any grant or conveyance thereof in his life*; resolved. 8 Rep. 95. a. Trin. 7 Jac. the first resolution in Matthew Manning's Case.

10. *As if a man seised of socage lands in fee devises, that if A. pays 100 l. to his executors, that he shall have the land to him and his heirs, or in tail, or for life, &c. and dies; and afterwards A. pays the 100 l. A. shall have the land by this executory devise, and yet he could not have by any grant or conveyance executory at common law; but this stands well with the nature of a devise*; Per Cur. 8 Rep. 95. a. Trin. 7 Jac. in Manning's case.

11. A. devised his freehold and leasehold lands to B. his son and heir (whom he made executor) *excepting 20 l. per annum for seven years, to be employed thus, viz. 100 l. to D. his daughter to be paid within five years, and 300 l. to his daughter E. within seven years*; this is a meer personal legacy, and B. being dead after the seven years, and not having paid, and no action lying on account against B's executors at law, or otherwise, D. and E. have their remedy in spiritual court. Cro. J. 279. pl. 9. Pasch. 9 Jac. B. R. Love v. Naplelden.

12 A. devised legacies, and afterwards said to his executor *I would have you increase them to such a sum*. This by the civil law is termed *commissum fidei*, and held a good legacy. Cro. J. 345. pl. 14. Pasch. 12 Jac. B. R. Penfon v. Cartwright.

13. Devise to A. but *if such and such things happen* (mentioning them) then the same *shall be reserved and put out to the use of B.* When the contingents happen, B. shall take. Cro. J. 394. pl. 7. Hill. 13 Jac. B. R. Blandford v. Blandford.

14. Devise was of 100 l. to B. *and that his executors should double it*. This was said to be a devise of 200 l. and the other side did not oppose it. Raym. 23. Mich. 13 Car. 2. B. R. in case of Nicholson v. Sherman.

legacies so devised to be doubled are executory legacies of the first testator, and not the legacies of the executor, who died before the action brought, which was afterwards brought against the executor's executor. — Keb. 116. pl. 20. S. C. says, this point was waived as a sufficient devise of a legacy, and that it was not at their discretion.

15. Testator

* Bull. 207.
S. C. accordingly.

Mo. 846.
pl. 1146.
S. C. adjudged. —
3 Bull.
98. Blamford v. Blamford. S. C. adjudged.

Sid. 45. pl. 4. S. C. it was agreed without any dispute, that such

15. Testator in his will *desires his executor to give to A.* 2601. but left it wholly to the executor's own free will how, when, and in what manner, to dispose of it to him; per Cur. 'tis a good legacy, and decreed the payment. Chan. Rep. 246. 16 Car. 2. Brest v. Offley.

in this case the desire was verbal, but the defendant owned it by her answer. — The words were, *you may if you please give 100 l. to A. but I leave it entirely to you*; Parker G. held it a trust, and decreed the money to A. but if any particular stance of *misbehaviour* had been assigned in A. it might have forfeited the trust. 10 Mod. 404. — G. Equ. R. 146. says, that this decree was against the opinion of several at the bar.

16. A paper writing left with a will, and written after, though it will not amount to a codicil, yet it is a good declaration of the intent of the testator, whom he intended to take as younger children by the said will. Ch. R. 265. 18 and 19 Car. 2. Hawtree v. Trollop.

17. A. possessed of a lease for years, devised it to his wife, in hopes she would leave it to his son. This is no trust; and the after husband of the wife having sold the term a bill was brought by the son to be relieved, it was dismissed; cited per Finch C. as a case in the time of Lord Ch. Egerton. Ch. Cases 310. Hill. 30 and 31 Car. 2.

18. A. bequeathed his personal estate to his wife for life, and what she has left at her death, it is my will and I do desire her, that it may be equally distributed between my own kindred and hers. A. died, and the widow marrying, a bill was brought by the relations to have an inventory and security given, because she had only the use of it during life; and the words (*what she has left*) shall refer to bona peritura, or such as may be quite worn out with using. But it being answered that the estate being so small that she could not live upon it without spending the stock, the Master of the Rolls said, that if that be so, it might alter the case, and directed the value to be stated by a master, and then he would give further directions. Ch. Prec. 71. pl. 64. Pasch. 1697. Cooper v. Williams.

19. Directions in a will that the heir shall renounce all his right in such lands to a younger son, amounts to a devise. Ld. Raym. Rep. 187. Pasch. 9 W. 3. cited by Treby Ch. J. as a point lately referred to Holt Ch. J. and himself by the Ld. Chancellor in the case of Hodgkinson v. Star.

20. A recital in a codicil cannot amount to a devise; as mentioning in the codicil that he had given an estate tail to B. whereas the estate he gave to B. by the express words was but an estate for life to B. and the tail to his son; this will not enlarge B's estate for life to an estate tail. 2 Vern. 449. 451. Mich. 1703. Arg. in case of Bampfild v. Popham.

S. C. & S. P. held according. Wms's Rep. 54. 55. Hill. 1702. Per Ld. Wright, Holt, Tre-

vor Master of the Rolls and Powel J. — Ibid. 53. S. C. & S. P. resolved.

21. Words of recommendation or desire in a will are always expounded as a devise; per Master of the Rolls. Ch. Prec. 202. Trin. 1702. in case of Eales v. England.

It was admitted, that the words *I desire, or I*

will, amount to an express devise; and that if a devise be to A. for life, directing him at his decease to give it to J. S. that amounts only to an use of it to the devisee for life, remainder over to J. S. 2 Vern. 457. pl. 427. Mich. 1704. in case of Eales v. England. S. C.

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22. A. by will gives 300*l.* to B. and declares *his will and desire that B. give the 300*l.* to M. his daughter, at his death, or sooner, if there be occasion* for her advancement. It was admitted that (*I desire*) or (*I will*) amounts to an express devise; and that if a devise be to B. for life, directing him at his decease to give it to J. S. that amounts only to a devise of the use of it to B. remainder over to J. S. and decreed the 300*l.* to M's administrator, she being dead. 2 Vern. 467. pl. 427. Mich. 1704. Eales v. England.

23. *Giving an executor power to sell* is no disposition; for the executor in this case takes no estate, but only has an authority, which when executed, and the executor in pursuance thereof makes a sale of the rent, then, and not before, are they disposed of, and excepted out of the general clause of the will; but if the executors don't sell, or if there be no occasion for them to sell, in which case they can't sell, then there is no disposition. 6 Mod. 111. Hill. 2 Ann. B. R. per Holt Ch. J. in delivering the opinion of the court in case of the countess of Bridgewater v. Duke of Bolton.

24. A. being angry with B. his son, and doubting if B. really was his son or not, devised almost all his estate to C. and on delivering this will to C. A. said to C. that *if B. behaved well, he might give him 20*l.* per quarter, and if he used that well, he might give him 40*l.* a quarter.* Decreed B. the 40*l.* per quarter. 2 Vern. 559. pl. 507. Trin. 1706. Kingman v. Kingman.

S. C. cited
G. Equ. R.
146. in case
of Jones v.
Nabbe.—
S. C. cited
30 Mod. 40.
Arg. in case
of Nab v. Nab.

S. C. cited Abr. Equ. Cases. 405. pl. 3. in case of Jones v. Nabbe.

25. A baron gives *all his estate to his wife, and says I desire and request my said wife to give all her estate which she shall have at the time of her death to her and my nearest relations equally among them.* Harcourt Chancellor. The words of the will being so *very general*, both in respect of the money, and the persons to take it, it does not amount to a devise, but it is only a recommendation to the wife to make such a disposition; but if he had desired she would have given it to a particular person, it is a good devise and a trust. A devise to the nearest relations is good; and such shall be so accounted as are next by the statute of distributions. 1712. in Canc.

26. So a request or *desire to pay debts*, is as a positive devise, for a request to pay debts can mean nothing but to charge the land; for the personal in all events is liable. Hill. 1715. Trot v. Vernon.—In Sir Oliver Ashcomb's case the devisee is executor, and desired to see the will performed, and real and personal both liable to debts.

27. Testator bequeaths his personal estate to his wife, and adds, *I do not doubt but my wife will be kind to my children*; the court thought these words gave a right to no child in particular, or a right to any particular part of the estate, but that the clause was void for uncertainty. 9 Mod. 122. Hill. 11 Geo. Buggins v. Yeats.

(I. 7) Good. In Regard of the Person to whom.
Persons capable or not.

1. **PERSONS** outlawed in a personal action, or *convict* or *attainted* of felony or treason are capable of a devise, though it is liable to forfeiture, as the case is. Noy's Comp. L. 100.

2. A devise to *the heir of Nicholas, who is an alien*, is void. 1st, because *Nicholas was alive*, Et nemo est hæres viventis. 2dly, Nich. being an alien could not have an heir. 1 Lev. 59. Hill. 13 & 14 Car. 2. B. R. Collingwood v. Pace.

3. A *papist cannot take a freehold or leasehold estate by will*, because taking by will is taking by purchase; and by the express words of the statute 11 & 12 W. 3. cap. 4. A papist is disabled to take * by purchase; also terms for years are expressly mentioned in the statute. 3 Wms's Rep. 46. Trin. 1730. Davers & al' v. Dewes & al'.

* he could not extend the land, for that would give him an interest in the land; and it is the same thing where the judgment is given in trust for a papist. Per Ld. Parker. Hill. 1719. Fletcher. Ibid. in the note.

For this reason it has been determined, that where a judgment was given to a papist is the same Lowther v.

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Devise to a papist above the age of 18 years is void, and if such devisee convey to a protestant purchaser for a valuable consideration, that conveyance is void also.

4. Upon a trial at bar in ejectment, the case was this, one Edmund Smith being seised in fee of the premises in question, *devised the same to Amy his widow and her heirs, Amy was a papist, and at the time of the death of the testator was above the age of eighteen years, and being of full age conveyed the premises for a valuable consideration to one Stanton, a protestant and his heirs*, the lessor of the plaintiff claimed as heir at law of the testator, and the defendant claimed under Stanton.

Upon this case two questions were made, 1st, Whether the testator was compos mentis or not, at the time of making the will. And 2d, Whether the conveyance made by Amy the widow, being for a valuable consideration was good within the statute of 3 George 1.

The first of these questions depending upon a matter of fact to be left to the jury, the counsel for the lessor of the plaintiff insisted that if it was against him, yet that this statute of 3 Geo. 1. does not avoid the disability created by the statute of 11 & 12 of W. 3. cap. 4. which disables papists to take the purchase, in regard, that in the statute of king George there is an express proviso, that this part of the statute of King William, shall, notwithstanding that statute of King George, be, and remain in full force; and the court declared their opinion to be so, but in regard, if the other questions should be with the plaintiff it would be sufficient to determine the right, it was left to the jury, who found that the testator was non compos, and therefore gave a verdict for the plaintiff.

Note, it was also made a question to be determined by the jury, whether the conveyance to Stanton was upon a valuable consideration, or not, and so three questions were made, two of which pre-

vious to the question upon the point in law on the construction of the statutes, and the question on this was, whether by the stat. 3 Geo. 1. cap. 18. s. 4. & 5. this sale was valid, and the court held not, that by the statute 11 & 12 W. 3. cap. 4. s. 4. there are different provisions for persons of different ages, viz. for those under eighteen by vesting estates limited to them for the benefit of their posterity, and these were intended to be able to convey to protestants; but as to others above eighteen they are absolutely disabled from taking any estate by purchase, and the statute of K. George never intended to enable them to convey what they had not, but only to facilitate the conveyances to the others in whom an estate was vested by the proviso in the statute 3 Geo. 1. cap. 18. s. 5. on which this opinion was given. MS. Rep. Pasch. 15 Geo. 2. B. R. Fairclaim on the demise of Borlace v. Newland & al'.

MS. Rep.
17 Geo. 2.
in Canc.
Willigbs v.
Keeble.

5. One Mary Bone by her will devised several estates in Hampshire to trustees and their heirs, as to part for payment of her debts, and after to raise a sum of 5000*l.* and to pay the same to one William Moor a defendant in the cause, or in default of raising such sum, then to convey to Moor, or as he should direct, and as to the other lands in trust, to pay the rents and profits to Mary Lacy the testatrix's mother during her life, and after to the defendant Moor during his life, and to raise and pay a further sum of 4000*l.* to the defendant Moor, and then to convey the remainder of the lands to the issue female of Moor in tail with other remainders over.

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Soon after the death of the testatrix, the plaintiff purchased of the defendant Moor, all his estate and interest under the will of Mrs. Bone, and which was conveyed to the plaintiff by the defendant Moor, in consideration of 1400*l.* by indenture of bargain and sale intolled, dated the 29th of January, 1733.

Upon the 28th June 1734 the plaintiff brought his bill against the trustees and against the defendant Moor, and the heirs at law of the testatrix, to establish the will and to have the trusts of the will performed.

The defendant Moor in his answer admitted his conveyance to the plaintiff, and that in respect of great incumbrances upon the estates he believed the 1400*l.* was the full value, and as much as his interest therein was worth at the time of the assignment thereof by him to the plaintiff.

The trustees submitted to assign the estates as the court should direct.

The heirs at law were all infants and put in their answer by guardian, and insisted if it should appear that Mary Bone did make such will, as set out in the bill, which they did not admit, yet that the devises and bequests therein to the defendant Moor are void, inasmuch as he was after the 29th September 1700, and at the time of making the said will, and of the decease of the testatrix, a person educated in the popish religion, and then and now professing the same, and that in respect thereof, and by an act of parliament made in the 11 & 12 W. 3. he is disabled to inherit, or take by purchase, any lands or hereditaments, or any interest therein within this Kingdom of England,

land; and insisted that the plaintiff's purchase is not a bona fide purchase or for a full and valuable consideration.

After the putting in this answer, the plaintiff upon the 29th Nov. 1742, filed a supplemental bill, charging that the defendant Moor did upon the 31st of May, 1742, in the King's Bench at Westminster, pursuant to the stat. 11 George 2. cap. 17. (which was in the year 1738) intituled an act for securing the estates of papists conforming to the protestant religion, &c. conform to the protestant religion by there taking the oaths and subscribing the declaration mentioned in the statute, and the plaintiff insisted that thereby his title to the premises, if it was before defective on account of the defendant Moor's being a papist, is now made good by virtue of this statute.

The infants, by their guardian, in answer to this supplemental bill, insisted, that if the defendant Moor did conform at the time and in the manner charged, yet that it has not made the plaintiff's title to the premises in question good, for that they the defendants did long before the time of the said Moor's pretended conformity enter their claim to the said premises at the quarter sessions of the peace held for the county of Southampton.

Upon these bills and answers the parties went to issue, and several witnesses were examined to prove the will, and also as to the fact of the defendant Moor's conformity, and to the question, whether the indenture of 29 Jan. 1733, was a bona fide purchase, and for a full and valuable consideration.

Upon the evidence, the will appeared to be well proved so that the questions rested upon the construction of the statutes and the questions, whether there appeared sufficient evidence of the defendant's Moor's conformity; and that the deed of 29 Jan. 1733, was a bona fide purchase and for a full and valuable consideration. The statutes upon which the whole depends, are 11 & 12 W. 3. cap. 4. 3 Geo. 1. cap. 18. s. 4. And the stat. 11 Geo. 2. cap. 17. which statutes are as follows. *The stat. of 11 & 12 W. 3. cap. 4.* is intituled, An Act for the further preventing the Growth of Popery; and so much of it, as relates to the present question, is in section 4. which contains two provisions;

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1st. That papists not taking the oaths within six months after their attaining the age of eighteen years shall be incapable to inherit any lands or hereditaments;

2d. That papists shall be disabled and incapable to purchase either in their own name, or in the name of any other, or to their use or in trust for them, any lands or hereditaments, and that all estates, terms, or other interest, or profits out of lands mediately, or immediately, to the use of, or in trust for, any papist shall be utterly void, and of none effect, to all intents, constructions, and purposes whatsoever.

By the statute of 3 Geo. 1. cap. 18. which is said in the title of the act, to be an act made for the securing of purchases made by protestants; and in the 4th sect. after reciting that some doubts had arisen upon the act 11 & 12 W. 3. and upon another act made in the 1 Jac. 1. and other acts made against papists and popish recusants, touching the sale of the estates of persons professing the popish religion, or incurring the disabilities and incapacities in the

said acts mentioned, it is provided, That no sale for a full and valuable consideration of any lands or hereditaments, or any interest therein, by any person being the reputed owner, or in the possession or receipt of the rents and profits heretofore made, or hereafter to be made, to and for any purchaser, and merely and only for the benefit of protestants, shall be avoided or impeached for or by reason or upon pretence of any of the disabilities or incapacities in the said acts or any of them contained, unless before such sale the person entitled to take advantage of such disability or incapacity shall have recovered such lands, &c. or given notice of his claim and title thereto to such purchaser, or before the contract for such sale shall have claimed the lands, &c. by reason of such disability or incapacity, and have entered such claim in open court at the general session of the peace for the county wherein the lands lie, and bona fide, and with due diligence pursued his remedy in a proper court of justice for the recovery thereof, the said several acts above mentioned and referred to, or any thing therein contained, to the contrary notwithstanding.

Provided nevertheless, That whereas it was amongst other things enacted by the said statute of 11 & 12 W. 3. That every papist should be disabled and incapable to purchase, either in their own names, or in the name of any other, or to their use or in trust for them, any lands or hereditaments, and that all estates, terms, or other interests or profits out of lands mediately or immediately to the use of or in trust for any papist, shall be utterly void and of no effect to all intents, constructions and purposes whatsoever; it is hereby declared and enacted, that the said recited part of the said act of parliament shall not be hereby altered or repealed, but the same shall be and remain in full force as if this act had never been made.

Then comes the statute 11 Geo. 2. cap. 17. which is intituled, An Act for securing the Estates of Papists conforming to the Protestant Religion against the Disabilities created by several Acts of Parliament relating to Papists. And after reciting, that persons professing or educated in the popish religion, are, by divers acts of parliament, subjected to several disabilities and incapacities, which may affect persons conforming from the popish to the protestant religion, and that many persons have already conformed and are willing to submit to his majesty's government, and that others are likely so to do, It is enacted, that all persons, being reputed owners, or in possession or receipt of the rents and profits of any lands or hereditaments, or any interest therein, who have been or are reputed to be papists, or educated in the popish religion, and have conformed to, or hereafter shall conform to, and profess the protestant religion, and have taken or shall take the oaths of allegiance, supremacy, and abjuration, and subscribe the declaration in the statute of 30 Car. 2. cap. in the court of Chancery, B. R. &c. and that all persons, being protestants, claiming under such persons, shall hold, possess, and enjoy all such lands, &c. freed and discharged from the disabilities and incapacities in the said acts, or any of them, for such estate or interest as such persons would have had if no such disability or incapacity had incurred, unless the persons entitled to take advantage thereof have actually and bona fide recovered, or shall hereafter recover such lands, &c. by judgment or decree in
some

Some action or suit, already commenced, or hereafter to be commenced, six calendar months at least before the making the records of such papists or reputed papists, taking the oaths, &c. and to be prosecuted with due diligence; and then follows a proviso, that the acts shall not prejudice the right of any person who shall have been in possession two calendar months precedent to such record.

Note, the very words of the statutes are not here inserted, but only what appears to be the substance of them.

Now it was argued by Sir Dudley Rider Attorney General, Mr. Murray Solicitor General, Mr. Brown, and Mr. Wilbraham for the plaintiff;

That the two statutes subsequent to the statute of King William, were made for the benefit of protestant purchasers, and therefore to be favourably construed, and rather to be stretched than otherwise;

That these statutes ought to be considered as acts of state founded on the principles of civil policy.

That the rights claimed from the statute of King William are unfavourable rights, for the statute was not calculated for the benefit of the heir or next of kin claiming under that statute; they have no natural right, the legislature thought it too much to take away the estates of papists and give them to the publick, and therefore gave them to the next of kin, or left them to descend, by declaring the incapacity to take by purchase; it remained therefore reasonable for the legislature to model, change, or destroy this incapacity as they thought fit, and in construction of what is done for such purpose, the right arising from the incapacity ought not to be favoured in respect of the imbecility of such right;

The great end of the statute of King George the First, was to induce papists to sell, and to draw estates out of their hands, and has an express retrospect; the words being of purchases heretofore made or hereafter to be made; and to entitle the plaintiff to the benefit of this statute, to avoid the effect of the statute of King William, nothing more need be shewn, than that the purchase made by him was a bona fide purchase, and for a valuable consideration, and that no claim was made according to the saving.

They considered then the value of the estate, by considering how many years purchase it is worth to be sold, and by making deductions for the charges and incumbrances upon it, and for the subsisting life upon part of it; by which means it was said to appear not to be worth so much as the 1400l. that was paid, and if the consideration was full, there is no ground to say it was not a bona fide purchase, and it was not pretended that any claim was made by the defendants, the heirs at law, till some years after the purchase, and no infancy or privilege in that respect, for laches make no difference for such heirs or next of kin not designed to be favoured; besides, infants are bound by general statutes unless there is an express saving for their benefit, as in the statute of fines, the statute of limitations, and other statutes.

That these purchases from papists are often made in a hurry to avoid claims, and the value ought not to be nicely scanned or

weighed in golden scales, and ought in general to be esteemed as valuable, if it appears to be a fair and reasonable purchase; that this is certainly such a purchase for a valuable consideration as would be good within the statute of Eliz. against fraudulent purchases.

Admitting then that the defendant Moor was a papist at the time of the devise and death of the testatrix, yet the claim of the heirs at law is defeated, and the plaintiff's purchase established under this statute of 3 Geo. 1.

But still the statute of 11 Geo. 2. throws out of the case the question on the purchase and the value of the estate; for under that statute the heirs at law are defeated by the conformity of the defendant Moor, and we have proved the record of his taking the oaths and subscribing the declaration, and it is not pretended that the defendants have taken advantage of the saving, that they have recovered or been in possession, or so much as brought any action or suit for what they now claim.

The intent of this statute was, to put all conforming papists on the same foot with protestants, and is in many respects in the same words as the statute of Geo. 1. unless that here no consideration is necessary to the conveyance of a conformist.

Lord Chancellor. I take the force of your argument to be this; That if this conveyance is taken to be for a valuable consideration, then it is to be established by the statute of K. Geo. 1. and if not, yet would be good, though a voluntary conveyance, under the other statute; but then if this should appear but a colourable conveyance upon a delusive sham consideration, this would not deprive the defendant Moor of the right, and would shew the plaintiff to have no interest either at law or in equity. People that come for equity must draw their equity from pure fountains, and Mr. Moor can have no decree, for he is a defendant.

In answer to this it was observed, that the defendant Moor had by his answer admitted the purchase, and prayed that it might be confirmed.

Mr. Chute and Mr. Cox for the defendants, the heirs at law.

Mr. Chute argued strongly that this purchase ought to be taken to be delusory and colourable only; that it appears from the face of the will, and from the pleadings in the cause, that here were many debts and charges upon the estate, and no account appears to have been ever taken of these incumbrances, which it can hardly be supposed but there must have been, if this had been a fair purchase; and the manner of defendant Moor's answering, and his answer not being put in till six years after filing the bill, are strong evidences on which to lay a presumption of a collusive purchase; and if this conveyance is in itself not for a valuable consideration, then it is plainly not helped by the statute of Geo. 1. and then as to the subsequent statute of K. Geo. 2. it relates only to the time to come, and has no retrospect; the subjects of the statute are papists who shall conform, and protestant purchasers from such papists; but the right in this case was previous to this statute vested in the heirs at law by the statute of King William, and insists therefore

therefore upon the whole, that this case is not affected by either of the said two statutes subsequent to the statute of King William, and that by the statute of King William the estates in question are well vested in the defendants, the protestant heirs.

Mr. Cox on the same side argued, that the title of the defendants, the protestant heirs, is clear and indisputable under the statute of King William, if not impeached or prejudiced by the two subsequent statutes.

The statute of King William has two clauses, 1st, Every papist, or person professing the popish religion, is disabled and made incapable to purchase any manors, lands, tenements, rents or hereditaments in his own name, or in the name of others to his use, or in trust for him; and 2dly, all estates, terms, and any other interests or profits whatsoever out of lands, tenements or hereditaments made to or in trust for the benefit of the papist, are made void.

Insists then 1st, That a devise to a papist is a purchase within this statute.

2d, That a trust is so likewise; and

3d, That money to be raised out of lands is also to be considered as an interest in lands, within the intent and meaning of the statute.

That these points were so settled and solemnly determined in the case of * ROGER and RADCLIFF, which was in the house of lords in 1713, and since in the case of Carrick v. Errington. 2 Wms's Rep. 361.

Argues therefore, that all the estates and interests devised and given by the will in question to the defendant Moor, are void; and therefore that the defendants, who are the protestant heirs, are entitled from this statute to take the benefit of these devises and bequests.

The title of the defendants being therefore plain under this statute, the question will be, Whether that title is at all hurt or defeated by either of the subsequent statutes.

The statute of 3 Geo. 1. cap. 18. recites that doubts had arisen upon this statute of King William, and upon an act made in the first year of K. James 1. and other acts made against papist and popish recusants; then comes the enacting clause upon which the present question arises; and immediately after follows a proviso introduced by the words provided always, nevertheless, that whereas, and then after reciting the whole clause in the statute of King William, it is enacted and declared, that this statute of King William should not be thereby (that is by that statute of K. Geo. 1.) altered or repealed, but that the same should be and remain in full force, as if that act of King George the 1st had never been made.

Argues therefore, that this proviso in the statute of King George 1. wholly and plainly avoids any effect which that statute can have upon the statute of King William; and that to make this statute of King George 1. consistent with itself, it ought to be taken not to extend to abridge or alter the statute of King William, but only to the other recited statutes.

Argues

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* 9 Mod.
167. 1814
S. C. —
2 Wms's
Rep. 4. S. C.
cited.

Argues further, that though very much is of necessity left in doubtful cases ad arbitrium iudicis in the construction of statutes, yet that where the words are plain, all courts of justice ought to hold themselves bound by the words; though the reason for them may not appear plain; that a contrary doctrine might be of most dangerous consequence, by supposing a kind of legislative authority in a judge whose office is only *jus dicere non condere*, and that this argument is the stronger in regard that the statutes now in question are (as hath been rightly observed) to be considered as acts of state and civil policy, and ought therefore to be more strictly adhered to, and to receive a construction according to the strict words, it being rather the duty of the courts of justice to take such laws as they find them, than to scrutinize, presume or guess at what was the foundation or reason of the legislature in making such laws.

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Taking therefore this statute of K. Geo. 1. upon the words of it, it is plain it can have no operation or effect upon the statute of King William to alter or repeal that statute; and though it may be said that the enacting part and proviso are repugnant, yet what is the consequence of this, supposing it to be so, the proviso contains the last words of the legislature, and therefore ought to be followed; but taking the whole of the statute together, the enacting part may be said to have reference to the statute of King James, and the other recited statute, but not to the statute of King William, and then the whole is made consistent. But where a statute is inconsistent or impossible to be observed *nihil operatur* and it is void, as was expressly held upon the statute *De asportatis religiosorum*, 35 E. 1. 2 Inst. 588.

And in the case of the Attorney General and the Company of Chelsea Water-Works, Hill. 4 Geo. 2. Scacc. Fitz-Gib. 195. per Reynolds Ch. B. Comyns and Thomson Barons, the question being upon the construction of the late land-tax act, it was held, that where the proviso of an act of parliament is directly repugnant to the purview, the proviso shall stand and be a repeal of the purview, as it speaks the last intention of the makers. And in Ld. Chanc. Hatton's Treatise concerning Statutes and the Exposition thereof, pag. 19. it is said, *Ubi manifeste pugnant legis voluntas & verba, neutrum sequendum est, verba, quia non congruunt menti, mens, quia non congruit verbis.*

These words seem, from the stile of them, to be drawn from the rules of construction in the Roman civil law, and as they appear to have been adopted, and by so great a man as Lord Chancellor Hatton in the rules of construction of the statutes of this kingdom, they ought to receive, at least, some weight.

Mr. Coxe then mentioned a case which he said he was just then informed of at the bar, which was in the court of B. R. and in which it was solemnly determined on a trial at bar, about two terms ago, that this statute of 3 Geo. 1. ought not to be considered as having any operation or effect upon the statute of King William to invalidate or avoid that statute; but Mr. Coxe not being able to state the case, Ld. Chancellor said, he could not take it at all into

See the case of Fair-claims on the demise of Borlace v. Newland, & al' Pasch. 15 Geo. 2. supra pl. 4.

his

his consideration; and the Solicitor General said, that case was not upon such a construction of the statute, but depended upon several particular circumstances.

Mr. Coxe then went on and observed, that supposing the enacting part of the statute of K. Geo. 1. [should be taken to extend to the statute of K. Wm.] yet it remained still to be considered as a question, Whether the purchase made in this case by the plaintiff can be taken to be a purchase for a full and valuable consideration within the statute of K. Geo. 1? for if it should not, it would be equally as strong as any of his other arguments to shew that the present case is not to be affected by that statute; but going on to speak to this point, Ld. Chancellor said, he might ease himself of that, for that if the case should appear to depend upon that question, he should direct it to be tried at law.

Mr. Coxe said, that supposing this statute could upon any of his other arguments be laid out of the case, the question would then turn upon the other statute of the 11 Geo. 2. cap. 17. which was made in the year 1738, and therefore long after the death of the testatrix, who died in 1732, and upon whose death these estates under the statute of K. Wm. vested in her protestant heir; and he observed; that this suit was instituted long before the making the statute, it appearing that the bill was filed so long ago as the 28th of June 1734.

Proposes therefore to consider 1st, Whether this statute can be taken to have a retrospect to devest the estates in question vested in the defendants, the protestant heirs, under the statute of K. William? and 2dly, supposing it may be taken to have such retrospect, yet whether this can be said to be itself a case within the statute?

As to the first of these questions he observed, that the words of the statute are all of the present or future time; that any person being in possession of any estates who shall conform, shall hold, &c. Purchases therefore to be confirmed by this statute must be purchases after the conformity, and the word being, plainly implies the present time; there is an essential difference, both in grammar and common sense, between the words being and having been; the statute therefore cannot be taken consistent with grammar and common sense, to have a retrospect to the time past; and the defendant Moor cannot be taken as a person being in possession at the time of the statute, because it appears of the plaintiff's own shewing, that all the right he ever had was long before the statute bargained and sold to the plaintiff, the purchase deed being mentioned to bear date as it does 29 January 1733. And the proviso which follows in the statute cannot be said to be any answer to this; for though it is thereby provided that the statute shall not prejudice the right of any person who shall have been in possession, yet that is restrained to persons having been in possession two calendar months preceding the record of the conformist's taking the oaths, &c. and therefore brings and restrains the whole to the grand subject of the statute any person being in possession.

To say then that the statute might be extended to times past, would be to deny the known sense of the words, and to alter the grand

grand relative upon which the whole statute depends; if such construction might be made, a statute might be made to mean any thing.

Besides, courts of justice will not, nor ought, to construe a statute to have a retrospect, without express words to warrant such construction; and there are many authorities to maintain this; by the statute of Gloucester it is provided, that the alienation of a tenant by the curtesy shall not bind his son; and in Lord Coke's comment upon this statute, 2 Inst. 292. it is said, this extends to alienations made after the statute, and not before, for it is a rule and law of parliament, that regularly *Nova constitutio futuris formam imponere debet non præteritis*.

By the statute of Westm. 2. cap. 46. after reciting that by the statute of Merton liberty was given to lords of manors to improve their waste, so as they left sufficient pasture for their tenants; and after reciting that the neighbours of such lords who are also called *Forinfeci tenentes*, had opposed this, it is provided that the statute of Merton shall extend to them, sufficient pasture being left. Now Lord Coke's Comment on this statute, after mentioning these words of the statute, *Statutum est de cætero* (i. e. the neighbours and *forinfeci tenentes*) *quod statutum apud Merton provitum inter dominos & tenentes suos locum habeat de cætero inter dominos & vicinos* is thus, 2 Inst. 474. This branch is from the making of this act an exposition of the statute of Merton, so as now the statute of Merton does extend *inter vicinum & vicinum*. But though it be an act of exposition of a former act, yet this exposition shall take effect but *de cætero*, that is, from the making of this act of exposition.

He then argued, that though these statutes are old statutes, yet that the rules here laid down are universally true and applicable to all statutes; and that the 2d Inst. is a book of the greatest authority for the exposition of statutes, not only for its own intrinsic worth, and the great regard that hath been always paid to it, but likewise in respect of its being published, as it appears it was, by vote and order of parliament.

But there are other cases upon more modern acts of parliament to shew, that the judges will not by construction, and without express words, extend an act of parliament to a retrospect.

In *HELMER* and *SHUTER* 2 Show. 16. and reported also in 2 Mod. 310, Sir J. Jones. 108. 2 Lev. 227. and 1 Vent. 330. in assumpsit on a parol of promise to pay a sum of money in consideration of a marriage, it was found by special verdict that the promise was made before the statute of frauds, and that that statute was made before the action brought, by which it is provided, that no action should be brought on such promise unless in writing; and it was held, that the statute should not be taken by a retrospect to extinguish the right of action, though strongly argued against by Serjeant Maynard for the defendant; and this was much stronger than the present case, for there there might have been grounds upon the words of the statute to support a retrospect.

In *MITCHELL* and *BROUGHTON*'s case Ld. Raym. 673. on a contract

contract to transfer stock made but not executed before the statute of 8 & 9 W. 3. cap. 32. against stock-jobbing, it was held, that the statute ought not to be taken with a retrospect to destroy the contract.

In *CARVILL and CARVILL's case* 2 Chan. Rep. 302. and in *SERJEANT and PUNTIS's case* Chan. Prec. 77. a will of lands was made before the statute of frauds, then came the statute, and after the testator died, and the will was held good though not executed according to the statute, for the statute is not to be taken to have retrospect. So in the late case of *ASHBURNHAM and KIRKHALL* upon the statute of mortmain, it was decreed upon the opinion of all the judges, certified the 4th of Decemb. 1739, that the statute should not avoid a devise in mortmain, where the will was made before the statute, though the testator died after.

Insists therefore upon all these cases, that a statute is not without express words, or merely by construction to be taken to have a retrospect, and therefore, that neither the statute of King Geo. 1. nor the statute of the 11 Geo. 2. should be taken to affect the present case, or to devert the right of the defendants, the protestant heirs of the testatrix; but in regard he cannot presume to say what weight these reasonings may have with the court, he must of necessity, in order to take in the whole of the case, suppose for a moment, that this statute should be taken to have a retrospect, and then other questions arise upon it.

1st, Whether upon the evidence the defendant Moor can be taken to have ever been the reputed owner, or in possession, or in the receipt of the rents and profits of the estate in question? and, 2dly, Whether it appears upon the evidence that the defendant Moor has in fact conformed to, and professed the protestant religion?

As to the first of these questions, insists that the evidence does not at all prove the fact, and therefore that this case is not a case within the statute. And as to the 2d, observes, that the statute requires two things, the taking the oaths, and conformity to the protestant religion. The taking the oaths is proved, but the evidence of conformity is no more than that the defendant was five or six times seen at church in a long space of time, and that too at different churches; evidence not sufficient to excuse a man from the penalties in the statutes of Q. Eliz. and Car. 2. for not going to church. But in a case of this kind, where the conformity was directly in issue, the not proving of it is the strongest presumption that there is not in fact any true and sincere conformity at all. The grand test, by which a man is to shew himself a true conformist to the religion of this country, is receiving the sacrament according to the rubrick of the common prayer.

But supposing all these matters against him, yet he has still another hope left for his client, and though perhaps it may appear a little paradoxical at first view, yet hopes it will not be condemned without hearing the reasons upon which it stands, and that is upon the several savings in the two acts of parliament with regard to which in respect that the defendants, the protestant heirs, at the
time

time of the decease of the testatrix, were and still are infants, insists that their not pursuing in time what is required by the savings in bringing actions, &c. and in regard here was actually a *lis pendens* before the making the last statute (no laches being imputable to infants) shall not deprive the defendants of that right to the estates in question which they have under the statute of King William, and that they ought still to have the benefit of performing these savings when they come of age.

But yet would not be thought to assert that infants are not bound by a general act of parliament which to be sure they are; and it is highly fit they should be, but takes this distinction, that though an infant is bound by the general purview of an act of parliament, yet that he is not by collateral matters relating to such purviews; and to maintain this distinction cites 1 Hale's Pleas of the Crown, 21.

Carth. 122. The reason of infant's privileges is to protect his property, with regard to which the law restrains him from prejudicing himself. Besides, in construing of acts of parliament the legislature must be taken to be constant of the rules of law, and therefore to know that an infant cannot bring actions, and it must therefore in construction be taken that the privileges of infants were not intended to be affected by the savings in these statutes.

Lord Hardwicke Chancellor. This case is brought before the court in a very extraordinary shape; first, as not wanting the aid of the statute of King Geo. 2. and then as strengthened by that statute under a supplemental bill; but the question will depend on the three acts of parliament that have been mentioned; the statute of King William, the statute of the 3d of King Geo. 1. and the statute of 11 Geo. 2.

As to the first of these statutes, it is mentioned as a ground of disability in the defendant Moor the devisee, under whom the plaintiff claims, and to shew a right in the defendants, who claim as the protestant heirs of the testatrix, and this statute was, to be sure, made to prevent papists from acquiring new estates.

Then came the statute of K. Geo. 1. and this statute, and the proviso in it have a seeming repugnancy, and I would take notice; that the statute in this respect hath always been doubtful; some people have thought that the proviso restrains the statute, and it is certainly a very odd proviso. But I think the meaning of the proviso was only *ex abundanti cautela* against papists, and was not designed to affect purchasers, for if it were otherwise, the security to protestant purchasers under the statute would be a most doubtful security.

I think therefore the question between the plaintiff and the protestant heirs upon this statute, is only whether the purchase made by the plaintiff, appears to be a good and valid purchase or not?

Now, upon this I may say, I am extremely doubtful, and if the cause should turn upon that, I should certainly direct an issue to try the fact.

As to the consideration paid for this purchase, it is rightly said, that the court should not weigh it with golden scales, and that the intention

intention of this act only, was, that a fair bona fide sale should be made, but then it brings it to the question, Whether this was so or not? the price is not what I lay much weight on, but there is a purchase of a trust estate charged with the payment of debts and legacies, and no account appears to have been taken of the debts or the interest thereof, or of the legacies, and the purchase appears to have been made without any privity at all of the trustees, and it can hardly be imagined that such a purchase would have been made between a fair buyer and seller, without the privity of the trustees, and without any account being taken of the charges upon the estate.

But I think the question upon these matters is avoided by the subsequent statute of 11 Geo. 2. the consideration of which is introduced upon the supplement bill.

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Now, by this statute it is provided, that all persons being reputed owners, or in possession of any lands, or any interest therein, who have been or are reputed to be papists, and who have conformed to, or hereafter shall conform to the protestant religion, and take the oaths, shall hold and enjoy such lands, freed and discharged from the disabilities and incapacities created by the statute of King William.

It appears then, that the defendant Moor hath taken the oaths, and supposing the evidence of the conformity to be sufficient to prove it, I am of opinion that these estates would thereby appear to be well vested by the will in the defendant Moor under this statute, supposing the other out of the case, and though it may be said, that supposing the estate under this statute to be in the defendant Moor, yet, that it would not help the plaintiff, for he must recover upon his own strength. But as to this I must take the whole case together, and then what are the admissions in defendant's answer that this was a good grant, and for a valuable consideration, and such as the defendant prays by his answer may be carried into execution and be established, the grant therefore being as coupled with the answer, binding to the defendant, and as the grant, though voluntary, would be good under this subsequent statute, I am bound if there were no other objections against it, to decree the trustees to convey to the plaintiff.

But there are other questions that arise upon this statute of K. Geo. 2. First, as part of the estate devised to the defendant Moor was a reversion, whether a reversion as such be within the statute or not; and I am of opinion that a reversion is within this statute, and that the words of the statute warrant such construction, for what is the reputed ownership of lands, or any interest therein? can it be said that a reversion is not? it plainly is, and there are equal conveniencies in respect of a reversion, as there are of estates in possession.

But then another and more difficult question arises, whether this statute hath any retrospect.

The word (claiming) in the statute must refer to the present, and all future times, but then it is to have a relation, and comes back to the first words, that all persons being reputed owners, and

who

who have been, or are reputed to be papists, if these words should be taken to restrain the statute from having a retrospect, to what time should the statute be taken to refer? Take it in the common sense, it must commence immediately as a law, or shall it be referred to the time of the conformity, or the time of taking the oaths?

Acts of parliament are to be construed according to the vulgar sense of words; great correctness of stile is not to be expected from them; and there are several acts of parliament wherein these sort of particles are to have various meanings and interpretations.

The statute was as a general law to take away rights which the legislature considered to be particularly in their power; besides, as it is to restore old rights, and to avoid forfeitures and disabilities, the taking the statutes to have such retrospect falls within the general reason of the thing, and the justice of the case, and I think the defendants, notwithstanding their infancy, are bound by this act of parliament, the legislature, if they had intended to save the right of infants, would have inserted some clause for that purpose; and though there are some statutes, in criminal cases, which are held not to bind infants, yet the general rule certainly is, that an infant is bound by an act of parliament, unless there is a particular provision to save his privilege.

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Two questions then arise upon the statute, whether the defendant Moor was the reputed owner of these estates? and it seems clear that at the time of the plaintiff's purchase he was so, and then by the express words of the statute the titles of protestants claiming under such persons are expressly confirmed. And the question whether suppose a papist has conveyed for a consideration not valuable, and then conforms, shall this make the purchase good, is a question not to be considered in the present case; for a voluntary conveyance would certainly be good under this statute as a provision for a child, &c. and with regard to this statute the imputations upon this conveyance are immaterial, for if it was colourable and collusive only, yet this act don't affect it; and though the defendant Moor might under this head insist, that the plaintiff hath no right, either at law or in equity, to the estates in question; yet as the defendant by his answer confirms the plaintiff's purchase, and prays it may be established and fully executed, it must be taken as binding to him, and then in this light I am of opinion, that the plaintiff is intitled to a decree.

And therefore if the other question, which arises upon the statute whether he is sufficient evidence of the conformity of the defendant Moor be laid out of the case, or should be taken to be sufficient, I should then be obliged to decree for the plaintiff. But I must say I am not satisfied in this; he might easily have obtained dispensations for going to church, though not for receiving the sacrament, and here is no evidence of his ever receiving the sacrament; and as the proof of conformity is directly thrown upon him, he ought to have cleared it; and though there is no publick conformity that the law takes notice of further than the going to church and receiving the sacrament, yet it is well known that he might solemnly and publickly have renounced the errors of the church of Rome, and as no-
thing

thing of this kind appears, if it is insisted on for the defendants, the protestant heirs, I shall direct an issue to be tried, whether the defendant Moor has conformed to the protestant religion, or not.

But such issue being waived by the counsel for the defendants, the heirs, Ld. Chancellor declared the will of Mary Bone, the testatrix, to be well proved, and decreed the trustees named in the will and defendants in the cause, to convey the freehold, and to surrender the copyhold estates in question to the plaintiff and his heirs; but decreed that the plaintiff should pay to all the defendants their costs of suit. MS. Rep. 17 Geo. 2. Canc. Wildigos v. Keeble.

(I. 8) Good. As to Persons &c. not in Esse, or not named.

1. A Devise made in remainder to a corporation where there is no such is void, though there be such a corporation made before the remainder fall; otherwise, if the corporation be begun, but no head yet chose; per Hobart Ch. J. Hob. 33. cites Aid 33. 9 H. 6. 23 and 49 E. 3.

2. So if I devise lands in remainder to the heirs of J. S. it is void, if there be no such J. S. though there be one, and heirs of him before the remainder fall; per Hobart Ch. J. Hob. 33. cites 2 H. 7. 13. by Keble.

3. In all devises there ought to be a devisee in esse, who has power and capacity to take the thing devised at the time when it ought to vest. Plow. 345. a. per Loveless serjeant, and the other justices præter Walshe Trin. 10 Eliz. said it as a principle in law.

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4. A. devised to the heirs of the body of his wife, if they attain the age of 14 years; A. dies, leaving no issue; but the wife had issue by a second husband; per Windham and Moreton J. it is not good, because to a person not in esse, and on a double contingency; but per Twissden and Keeling J. contra, notwithstanding the double contingency, it being all one with a devise to an infant in ventre sa mere when he shall be born, and the contingency is to take effect within the compass of a life; and this cannot be by way of remainder, though the wife has an estate for life; because it is a new devise to take effect on her death, and is not as a remainder joined to his estate. Lev. 135. Trin. 16 Car. 2. B. R. Snow v. Cutler.

Raym. 162.
S. C. the
court di-
vided.

5. Devise of land to the first son of A. A. having none at that time, is void. 1 Salk. 229. Trin. 9 W. 3. C. B. Scatterwood v. Edge.

So a devise
to the first
male of A.
A. having

no issue at the time of the devise is void. 12 Mod. 278. Scattergood v. Edge S. C.

(I. 9) Good or not.

Where it is made to Infant en Ventre sa mere, &c.

1. IF a man devise to an infant *en ventre sa mere*, and dies, this is a good devise, and yet the infant is not in *rerum natura* at the time of the devise, nor at the time of the death of the devisor; per Babbington; contra per Paston J. Br. Devise, pl. 32. cites 11 H. 6. 12.

* Dult.

* 73. Arg. cites S. C. and 11 H. 6. 12. to the same purpose that such an infant is not capable of an estate, notwithstanding that charters

2. A man devised two parts of his lands to his four youngest sons in tail, and if the infant *in ventre sa mere* be a son, that he shall have the fifth part as coheir with the four youngest brothers, and if all five happen to die without issue male of their bodies, that the two parts shall revert to the next heirs of the devisor for ever. The father died, the son is born, and after he and three other of the said sons died without issue. Sanders, Dyer, Bendloe and Mead held, that the after-born son shall take nothing, because he was not capable as purchaor when the devise took effect; but Whiddon contra. Dy. 303. b. 304. a. pl. 49, 50. Mich. 14 Eliz. Anon.

may be detained for him.——2 Mod. 9. Hill, 26 & 27 Car. 2. in Canc. in the case of Nurse v. Yearworth. Ld. K. Finch, who said, that at common law, without all question, a devise to an infant in ventre sa mere of lands devisable by custom was good, so that the doubt arises upon the statute of H. 8. which enacts, that it shall be lawful for a man by his will in writing, to devise his lands to any person or persons; for in this case the devisee not being in *rerum natura*, in strictness of speech is no person, and therefore it has been taken, that such a devise is void. Mo. and it is left a quere in the Lord Dyer 430. But in two cases in C. B. one in the time when Ld. Ch. J. Hale was judge there; the other in the Lord Ch. J. Bridgman's time, it has been resolved, that if there were sufficient and apt words to describe the infant, though in ventre sa mere, the devise might be good. But in B. R. the judges since have been divided upon this point, that as the law stands now adjudged, this devise in our case seems not to be good; but should the case come now in question, he said, he was not sure that the law would be so adjudged; for it is hard to disinherit an heir for want of apt words to describe him; and it is all the reason in the world, that a man's intent, lying in extremis, when most commonly he is destitute of counsel, should be favoured.

It is good if construed as an executory devise, but not if as an immediate devise. Per Bridgman Ch. J. Cart. 5. Mich. 16 Car. 2. C. B. in case of Davis v. Kemp.——Windham J. said, that D. 303. b. 304. which saith that devise to infant in ventre sa mere is void has been denied to be law, and that upon search, the roll does not warrant the judgment reported by him. Sid. 153. in case of Snow v. Tucker.——Lev. 135. S. C. Snow v. Cutler. S. P. and says, that Hale Ch. J. and Hyde Ch. J. were of the same opinion.——Devise to infant in ventre sa mere is good. But devise to son in ventre sa mere is void. Cart. 87. 98.——In the case of Snow v. Cutler. Lev. 135. Windham and Morton J. held a devise to infant in ventre sa mere generally without saying when he shall be born, to be a void devise; but Twisden and Keeling J. contra. But all agreed, that by adding the words, when he shall be born makes it a good devise.——S. P. Per Holt Ch. J. Skin. 559. 560. and cites Snow v. Cutler.——Raym. 162. S. C. accordingly.

3. If a man devises land to infant en ventre sa mere, if he be not born in the life of devisor, the devise is void; per Coke and Dodderidge. Roll. Rep. 110. Mich. 12 Jac. B. R.

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4. A. makes a lease of lands in L. and G. for 99 Years to B. to commence after his death, in trust to the use of his last will. Afterwards A. by will directed that *Blackacre part of his lands in L. should be sold for 20 years* for payment of debts and legacies, and after

2 Mod. 8, Nurse v. Yearworth. S. C. in Canc. do.

after the expiration of the said 20 years to the heirs of his, the testator's body, on the body of his wife to be begotten, and for default thereof to B. and his heirs; And all other his lands in L. to the use of the heirs of his body on the body of his said wife, &c. and for default to W. R. for 20 years, and after to B. and his heirs. And if A. have no issue living at the time of his death, then he devised Whiteacre part of his lands in G. to B. and his heirs, immediately after the death of A's wife (who was jointured therein.) A. died, leaving no issue born, but soon after a son was born, who lived till after age, suffered a recovery, and devised the lands to J. S. and died without issue. Though the son was not born till after his father's death, yet he had an estate tail. And the residue of the term of 99 years, notwithstanding the recovery and will by the son, was decreed to be assigned to J. S. it being a term in trust. Fin R. 155. Mich. 26 Car. 2. Nourse v. Yarworth.

creed accordingly.—
S. C. cited
by Powell
J. 12 Mod.
284.

5. The law is clear now, that a devise to an infant en ventre sa mere is good enough, though he be born after the death of the testator, and he shall take by way of executory devise when he is born; per North Ch. J. Freem. Rep. 293. pl. (344. b.) Trin. 1677. C. B. Anon.

6. Whether the devise to infant in ventre sa mere is good, has never yet been settled; but there have been varieties of opinions in it. The first I find is 11 H. 6. 15. and there Babington thought it good; and Paston contra. It is in Brook tit. Devise 609. with a quere. 7 Co. 9. without any decisive opinion. 1 Roll. Ab. 609, 610. with a dubit' Dy. 303, 304. Devise to infant in ventre sa mere if it be a son, void; but I hold that not to be law, because it is executory and not contingent; but a fortiori it would be void by way of present interest. It is again mentioned in Dyer 342. but no opinion. Mo. 127. and no opinion. 177. adjudged good; but 664. held void. Cro. E. 435. 'if there be a new publication of a will after a son born, good, secus not. 2 Bulst. 272. not good. 1 Roll. Rep. 110 void. Litt. Rep. 255. void. And thus it remained till K. Ch. 2d's time. In Snow and Cutler's case, case in Sid. 153. and Keb. court was divided; but in 2 Mod. 9. Chancellor Finch held it good, and my Lord Bridgman held the same with a great respect to former opinions; and I hold it to be good, because the rule is, that when by the words of deviser it apparently is designed for a future interest or devise, it is good; and when devise is to the son in ventre sa mere, without more saying, it is plain he means a future devise, because by the very words he takes notice of his not being in esse; and that is tantamount, as if he had devised to another for a time, or let it descend to the heir for a time, but in a devise to the first son of T. S. who has no son at that time, none can tell by the words of deviser whether he meant it should take presently, or futurely, and therefore it is no more than a present devise to a person not in esse; per Powell J. 12 Mod. 282. Pasch. 11 W. 3. C. B. in case of Scattergood v. Edge.

The court does d, that allowances shall be given to a daughter that was en ventre sa mere at the time of the devise, although void in law. Toth. 134. cites Mich. 3 Jac. Pope v. Courteney.—Ibid. 157. seems to be S. P. S. P. cites 3 Car. or 3 Jac. Pope v. More.

7. Per Powell J. a use limited to a son in ventre sa mere is void, because no person according to the statute of uses; but, statute

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of wills makes no mention of person, and that makes the difference. 12 Mod. 283. Pasch. 11 W. 3. C. B. in case of Scattergood v. Edge.

8. A. devised 500l. to the eldest son of B. to be begotten to place him out apprentice, a son born after A's death shall take. Per Wright K. 2 Vern. 431. pl. 393. Hill. 1701. Nevill v. Nevill.

Where a disposition of a trust in fee comes in question, equity will never expound the will to make a disposition for want of apt words to describe the child en ventre sa mere, unless there were plain words to exclude him. Fin. R. 159. Mich. 26 Car. 2. Norris v. Yarworth.

9. A devise to trustees and their heirs in trust for A. for life, and to his first and other sons in tail; but if A. dies without an heir male, remainder over this being of a trust may support the remainder to a posthumous son. See 2 Vern. 450. Mich. 1703. in case of Bamfield v. Popham.

10. A. by his will devised land, in case he should leave no son at the time of his death, to J. S. and his heirs. A. died, leaving his wife *præmunt enfeint* of a son. The question was, whether J. S. the devisee was intitled to the land. Ld. C. Parker referred it to the judges of B. R. who certified, that it was not an absolute devise, but subject to the contingency of A's leaving no son at the time of his death, which they thought had not happened, and therefore that J. S. cannot take; and the testator having expressed no intention in the will of disinheriting his only son, J. S. is not intitled, and his lordship agreeing therewith, decreed J. S. to deliver up possession and account for the profits received. Wm's Rep. 486. Mich. 1718. Burdet v. Hopegood.

11. An executory devise of an estate of inheritance to a person unborn when he shall attain the age of 21 years is good, and there is no danger of a perpetuity. Cases in Equ. in Ld. Talbot's time. 228. Mich. 1736. Stephens v. Stephens.

In Canc. coram Ld. Hardwicke Lincolns Ion Dec. 19. 1744. Basset v. Basset.

12. This was a bill brought by Basset an infant against his uncle, to have an account of the real and personal estate of his father, upon which several questions arose; the first related to the real estate, and was this. J. Pendarves Basset, father of the infant, settled the bulk of his estate in marriage to himself for life, remainder to trustees to preserve contingent remainders during the life of the father, remainder to wife for life, remainder to first and every other son for life, remainder to his brother for life, who was the now defendant, but there was no limitation to trustees to preserve remainders if his wife should be *præmunt enfeint*. Basset the father died, his wife *præmunt enfeint*, Basset the uncle entered; eight months after the son was born, and entered upon his uncle, and now the question was, who shall have the intermediate profits upon the death of the father to the birth of the son.

Ld. Chancellor held, that as to this point, it must depend upon the construction of the 10 and 11 W. 3. c. 16. and as to that, it must be considered what was the mischief intended to be remedied, and what remedy the legislature have applied. Now the defendants say, nothing was intended to be remedied but the vesting of the remainder, which they say was the only evil complained of in the case of REEVE v. LONG, in the house of lords, which was the foundation and occasion of that act; but I am of opinion this

was not the single mischief that was intended to be prevented, but the whole evil, and they meant not only to give posthumous children power to enter, but to take the profits also according to the intention of persons making settlements and wills too of this kind, and this appears both from the title, preamble, and provision of the statute, and the words are so plain, that to put any other construction upon them would be to repeal the act which *says, such posthumous child shall take in such manner as if born in the life of his father.* [88] But it was said by the defendant's counsel, that the words take, &c. meant only that he should take remainder in such manner as heirs at law by descent take who have not intermediate profits, and that this being a new law, ought to be considered according to the rules of common law in similar cases; and it is true, it is a usual manner of construing new acts according to the old rules, but to do so in this case would be repugnant to the words of the act, *for heirs by descent do not take as if born in the life of their father*; but the addition of the words in the act, *although no trustees to preserve contingent remainders*, clears this of all objections, and as before that act all accurate conveyancers inserted such limitations, so since they have left them out, which plainly shews their sense of the statute. But the objections on the part of the defendant are these, that there must be some tenant to the freehold, there must be some-body to answer to the precept of a stranger to bring actions of trespass, &c. and this can be nobody but the uncle. As to this, I do not know whether it is material for me to consider it because I can get at it in another way, but judges in such cases must mould and frame such estates as are agreeable to the plain intention of the legislature. It may vest in the uncle and divest upon the birth of son by relation, and this is agreeable to the construction of law in other instances, as in the case of inrollment of deeds; here though a person has no title till inrollment, yet from the inrollment he is in from the time of execution of the deed. As to the objection that there is no legal remedy for the profits against the uncle, I think if my construction of the act is right, the son might bring an ejectment and lay his demise to the time of the death of his father, and every body would be estopped to say he was not born in the life of his father, for how could the defendant take the objection? not till he had entered into the common rule; and though it is at the plaintiff's peril if he lays his demise before his title accrued, yet if my construction is right his title did accrue, and it would be immaterial whether he could or could not in fact make such demise, because such demises are only looked upon as matter of form, and not real, for infants make such demises every day. But suppose this point of law was otherwise, I am of opinion this court would make the uncle a trustee for the infant, and that seems to me to be the meaning of the act of parliament, and though it is natural to pursue legal remedies where such are to be had, yet that is no reason if they are not to be had why remedies should not be enforced here. I am therefore of opinion the intermediate profits of the settled estate must go to the infant,

(I. 10) Void in respect of the Time of making it, made good or not by some after Act or Accident &c.

1. A devise of one jointenant of land deviseable which he held in fee, at his death jointly with a stranger, is not good; the same law is of a use in jointure, &c. But if such deviser doth survive all his companions, then such devise is good. Perk. S. 500.

2. The consent of the heir will make a void devise good. Chanc. Cases 209. Trin. 23 Car. 2. Lord Cornbury v. Middleton.

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3. A. makes a feoffment to a feme covert, and afterwards A. devised the same land to another, the husband disagrees, this shall have a relation between the parties, so as the husband shall not be charged in damages, but it shall not make the void devise good. Arg. 2 Mod. 149. Hill. 28 and 29 Car. 2. B. R. in case of Abram v. Cunningham cites 3 Rep. 28. b. Butler v. Baker.

4. A. seized of Black-acre in tail, and of White-acre in fee, by mistake devised the intailed acre, and left the fee to descend. The devisee brought a bill in chancery, and had a decree to enjoy, cited per Cur. 2 Vern. 233. Trin. 1691. in the case of Thomas v. Gyles.

5. If a man be non compos, and not in his right senses at the time of making his will, though he afterwards, never so long before his death, becomes a man of understanding and sound judgment and memory, yet the will is a void will, and will by no means be made good; because he wanted the disposing power at the time of disposition, which was the time of making his will; per Ld. Ch. J. Trevor, in delivering the opinion of the whole court. 11 Mod. 157. Hill. 6. Ann. C. B. in case of Archer v. Bokenham.

6. So the law is the same of a feme covert; if a married woman makes a will, though she becomes a widow and unmarried before her death, yet such is a void devise without republication, for the law here regards the time of making only. 11 Mod. 157. per Trevor Ch. J. in delivering the opinion of the court. Hill. 6 Ann. C. B. in case of Archer v. Bokenham.

7. So it is in the case of an infant; if he makes a will, though he be of age, nay, though never so old when he dies, yet it is a void devise because he had not discretion nor a disposing mind, at the time of making; for it is that which the law regards in these cases, and not the time of the death of the testator; per Trevor Ch. J. 11 Mod. 157. in case of Archer v. Bokenham.

(K) What shall be a *good devise against Law and Reason.*

[1. **A** Devise against law and reason is void. 11 H. 6. 13. b.] When the intent of the testator in his will does not agree with the rules of law, there this intent is void; as if J. S. devises land to A. in fee, and if he dies without heir that B. shall have the land, this devise is void to B. because one fee simple cannot depend upon another; per Croke J. Bulst. 63. Mich. 8. Jac.

[2. If a man devises to one for life, the remainder to another and the heirs male of his body, and if he dies without issue male, that when any of his heirs females shall have issue * male, he shall have the land; if he in remainder dies without issue male, upon which the issue female enters, though she hath issue male after, yet he shall not have it by the limitation, because his intent is against reason. 11 H. 6. 14.] * In Roll it is (female) but in the year book it is (male)

[3. So if a devise be to one and his heirs, and in case he hath issue a daughter, that she shall have the land, if the devisee hath issue a son and daughter, and dies, the son shall have the land, though the daughter took husband after, and had issue a son, he shall not oust the other, for his intent was against reason. 11 H. 6. * 13. b.] * This is misprinted and should be (14)

[4. If a man devises a chattel personal to one for life, the remainder to another, this is a void remainder. Mich. 5 Jac. B. per Curiam.] But see the division infra, in what cases a devise of personal chattles with remainder is good or not.

[5. If a man possessed of a lease for years of land devises it to one for life, the remainder to another, though the first devisee hath the whole estate of the term in him and so no remainder can depend upon it at the common law, yet it is a good devise to the second devisee by way of executory devise. Mich. 5 Jac. b. between Mallet and Sir Henry Sackford.] [90] Cro. J. 198. pl. 26. S. C. the court divided, & adjournatur. —S. P. adjudged

accordingly. 8 Rep. 95. a. b. Trin. 7 Jac. Matthew Manning's case. —S. C. cited and S. P. adjudged. 10 Rep. 46. b. Mich. 10 Jac. in Lampet's case. —Cro. J. 461. Hill. 15 Jac. cites the cases of Manning and of Lampet, and Pl. C. 520. 540. D. 74. 277. and that all the judges of C. B. and all the barons, præter Tanfield, agreed, and that the first grant or devise of a term made to one for life, remainder to another has been much controverted, whether good or not, and whether all might not be destroyed by the alienation of the first party, and if it were now first disputed it would be hard to maintain; but that being often adjudged they would not now dispute it.

[6. Hill. 16. Jac. in Scaccario, in Sir Rich. Lewknor's case, agreed per Curiam.] Roll. Rep. 356. pl. 8. Pasch. 14.

Jac. B. R. Bennet v. Lewknor. S. C. adjournatur.

[7. But if a man possessed of a term devises it to one and the heirs males of his body, and for default of such assise, to another, and the heirs males of his body, this is a void devise to him in remainder, because, by the rules of law, a remainder cannot depend upon the limitation of a fee, scilicet, upon the death of another without heirs male of his body. Hill. 15 Jac. in Scaccario, between H 4 Johnson] * Roll. Rep. 356. pl. 8. S. C. by the name of Bennet v. Lewknor adjournatur.

Palm. 50. Johnson and Sir Rich. Lewknor, adjudged upon a special verdict by Tanfield and Bromly against Denham, for if this should be suffered, a man might make *perpetuities of a term*, and there should be no means to destroy it; vide the same case, my reports, Pasch. 14 Jac. Contra H. 10. Jac. B. R. between Rhetorick and Chappel adjudged.]

ed that the remainder was merely void.——In Roll. Rep. no mention is made of the word (body) till in a fourth limitation to a fourth son. But in Palm. the word (body) is mentioned in the first limitation to the first son.——2 Bulst. 28. S. C. the testator devised, that his wife, should have the occupation, manurance, and profits of the house and land to him leased, if she should live so long unmarried and dwell in the said house, and if she married or died within the term, that then R. his eldest son should have the occupation for so long as he should live and have issue of his body, and during the same time repairing the same; and if he died without issue, &c. the remainder over &c. adjudged a good remainder.

Roll. Rep. 247. pl. 17. [8. If a man devises a term to his wife, if she lives so long unmarried, and if she marries, then a rent to her out of the land, and makes the wife executrix, and dies, and the wife agrees to the legacies, and after takes husband, the rent shall rise to her well enough, though she once had the whole term in her as executrix, for this future rent shall not be extinct thereby. Mich. 13 Jac. B. R. between Goffo and Haywood. And Pasch. 14 Jac. Same case adjudged.]
S. C. adjor. natur.——
Ibid. 368. pl. 23. S. C. —3 Bulst. 121. Gough v. Howard; S. C. argued very much upon other points principally, and no judgment given.——Bridgm. 52. Gough v. Hayward S. C. & S. P. admitted by all the justices.——Godolph. 244. cites S. C.

[9. If a man devises lands to B. his younger son, and his heirs, and that if he dies without issue, living A. his eldest son, that the land shall go to A. in fee; this is a good future possibility to A. in nature of a remainder, though it be dependant upon an estate in fee in B. for a future possibility by devise may well depend upon such estate in fee upon a collateral contingent. Mich. 18 Jac. B. R. between Browne and Pells, adjudged per curiam, upon argument upon a special verdict.]

Fol. 611. Fol. 611. and that by his dying without issue, living A. his estate was quite determined; and all, except Doderidge, * agreed, that a recovery suffered by B. could not hurt the future devise; but Doderidge was much against this opinion, by reason of the great mischief that might ensue by making perpetuities in devises, and cited Arther's case and Capel's case, but notwithstanding judgment was affirmed as aforesaid.——Cro. J. 590. pl. 13. Pells v. Brown. S. C. says that the limitation by the devise was to B. and his heirs in perpetuum, and therefore it was resolved by all the justices, that it was not an estate tail in B. but a fee, and likewise it was said in the will, paying to C. a third brother 20 l. at the age of twenty-one years; both which clauses shew, that he intended a fee to B. and they all agreed, that the limitation of the fee to A. is a good limitation by way of the contingency of B's dying without issue living A. though not by way of immediate remainder, which all agreed it could not be, but by way of executory devise.——a Roll. Rep. 196. S. C. argued, and ibid. 216. S. C. adjudged.——Palm. 131. to 141. S. C. argued and adjudged.——S. C. cited Arg. Win. 542 55. as adjudged.——S. C. cited Arg. 4 Mod. 283. S. C. cited ibid. 317. S. C. cited Cro. C. 185. in pl. 4.——S. C. cited Hardr. 150. S. C. cited Sty. 275 by Latch. Arg. said, that it had been adjudged contrary to the judgment in Pell and Brown's case if lands are devised to one and his heirs, and if he dies without issue, that the land shall be to another and his heirs, this is no estate tail; for it cannot stand with the rules of law to devise such an estate, because it is only a possibility, and if it should be more, it must be a fee upon a fee, and so a perpetuity, and it cannot be known within what bounds it shall end, either in case of years, or life, or other contingencies, and says this was adjudged Mich. 37 & 38. [but mentions no reign, though it seems to mean Eliz.] C. B. Rot. 1149. A devise to A. and his heirs and if A. dies, leaving his mother, then the land to remain to H. and his heirs; Roll. Ch. J. said, that the limitation of an inheritance after an absolute fee simple is void; for this would make a perpetuity, which the law would not permit, but if it be upon a contingent fee simple it is otherwise. Sty. 158. Pasch. 1651. Gay v. Gay.

[10. If one before the 27 H. 8. of uses had feoffees to his use, and after that statute, and the statute of 32 H. 8. of Wills, he had devised that his feoffees should make an estate to W. N. and the heirs of his body, and dies, this had been a good will by reason of the intention. 38 H. 8. f. 316.]

Br. Devise in pl. 48. cites S. C. & S. P. by Balthwin, Shelley and Mountague

J. determined for law. — S. C. cited by Hobart Ch. J. but says, quære if the land were never in feoffment. Hob. 32. — Br. N. C. 71. b. pl. 316. cites S. C.

[11. If after the statute of 32 H. 8. a man seised of lands enfeoffs A. and B. thereof, to the use and intent to perform his will, and after by his will reciting the said feoffment, and the feoffees to stand seised to the said use, declares his will to be, that the said feoffees and their heirs shall stand and be seised thereof to the use of J. S. and the heirs of his body, &c. this is a good devise of the land by the intention of the devisor, though by no possibility the feoffees could stand seised to the said use. D. 15. El. 323. 29. Linghen's case per Curiam.]

S. C. cited per Cur. Le. 313. in pl. 436. Mich. 32 Eliz. C. B. in Greaves's case. — 3 Le. 262. pl. 351. S. C. in totidem

verbis cites D. 323. Linghen's case. — S. C. cited by Doderidge. Poph. 188. Mich. 2 Car. B. R. and yet observes that J. S. was a bastard. — S. C. cited by Anderlon, Pl. C. 523. b. Hill. 20 Eliz. in case of Welkden v. Elkington.

[12. A man seised of lands makes his will, and in this devises, that J. N. and J. D. and their heirs, should stand seised thereof to the use of J. S. &c. though the said persons have nothing in the land, yet this is a good devise to J. S. for either this will amount to a devise to the feoffees to the use of J. S. or as an immediate devise to J. S. for his intention is apparent that J. S. should have it. Mich. 2 Car. Regis, B. R. between Burfield and Knarborough, for an Inn in Windsor, called the Garter, adjudged per curiam, upon evidence to a jury at bar.]

Poph. 188. Bufield v. Byboro S. C. the opinion of the whole court (nullo contradicente) was, that this was a good devise

by reason of the intention; and cited Br. Devise, pl. 48. & 15 Eliz. D. 323. for the proof of it. — Gibb. 18. Pasch. 1 Geo. 2. B. R. the S. C. cited by Raymond Ch. J. in delivering the opinion of the court, and said, that though J. N. and J. D. had nothing in the land, yet the devise is good to J. S. for either it shall amount to a devise to the feoffees to his use, or to an immediate devise to him; for the intention of testator is plain that J. S. shall have it. — Fortescue's Rep. 71. S. C. cited by Raymond Ch. J. in S. C. in totidem verbis. — Le. 313. pl. 436. Mich. 32 Eliz. C. B. GREAVES'S CASE. A. was seised of lands, and 6 Eliz. infeoffed J. N. and J. D. in fee to the use of his last will, by which he willed that his feoffees should stand seised of the said lands, untill Greaves had levied of the profits thereof 100 l. It was objected that here is no devise; for A. at the time of the devise had not any feoffees; but the exception was disallowed by the court. — 3 Le. 263. pl. 351. S. C. in totidem verbis. — Mo. 280. pl. 434. Mich. 31 & 32 Eliz. B. in case of Barry v. Trevillian.

* [92]

13. A Termor devised his term to his eldest daughter and her issues, the remainder (if she died without issue within the term) to the youngest daughter, &c. The eldest died without issue, and her husband sold the term. Baldwin and Shelly held that the youngest daughter is without remedy; because it is a void remainder, being only of a term, as it is of a chattle personal; Englefield contrary, because of the intent of the testator. Baldwin said, he agreed that if one devises his term to J. S. upon condition that if J. S. dies within the term, that W. R. shall have it, here he does not give all his term and interest to J. S. but so much only as shall incur during his life, and W. R. shall have the residue; but in the principal case he devises the entire term to the eldest daughter; and said that he moved this case when he was Serjeant, and that the court was of his opinion now, &c. D. 7. a. b. pl. 8, 9. Trin. 28 H. 8. Anon.

14. Lessee

14. *Leſſee for years deviſed that his wife ſhould have the occupation of his lands for ſo many years as ſhe ſhould live, and after her deceaſe the reſidue to his ſon and his aſſigns, and made her ſole executrix, and died, the widow entered and agreed to the legacy, and afterwards ſold the term, and died before the leaſe was expired. Adjudged this was not a deviſe of the whole term to the wife, but upon a contingency if ſhe ſhould live ſo long, and her intereſt is determined on her death, ſo that this ſale was void againſt the ſon, becauſe the remainder was to ariſe to him upon a contingency of her dying before the term expired; therefore the deviſe of the reſidue to him ſhall be expounded to precede the deviſe to the wife, that both may ſtand; for there was no expreſs eſtate for life deviſed to her, if it had the would have been intitled to the whole term; becauſe in judgment of law an eſtate for life is more valuable than for years. Pl. Com. 519. Hill. 20 Eliz. C. B. Welkden v. Elkington.*

As to croſs remainders, See tit. Remainder (X.)

Jo. 15. in pl. r. cites S. C. — S. C. cited ſelect caſes in Canc. 30. by Ld. Chancellor Nottingham.

(L.) Againſt Law [Remainders of Terms of Years.]

[1.] *If A. poſſeſſed of a term for years, deviſes it to B. and the heirs male of his body begotten, the remainder to C. and the heirs male of his body begotten, this is a void remainder to C. becauſe it is to commence upon a limitation of the death of B. without heirs male of his body, which is moſt remote, and by the deviſe before to B. and the heirs male of his body begotten. B. had the whole term, which ſhall come to his executors, and not to his iſſue, and he hath the whole power of diſpoſing thereof to whom he pleaſes during the term; and if he does not diſpoſe thereof, yet his executors ſhall have it if he dies without iſſue, and it ſhall not revert to the executor of A. Paſch. 11 Car. B. R. between Leventhorp and Aſhby, per Curiam, reſolved upon a trial at bar; and they would not ſuffer it to be argued for the clearneſs thereof, nor to be found ſpecially. Intratur, Mich. 10 Car. Rot. 120.]*

[2.] *If A. poſſeſſed of a term for 163 years, deviſes the uſe and occupation thereof to B. his brother for life, and after to the wife of B. for life, and after to the eldeſt ſon of B. for life, and after ſuch ſon * dying without heir male, to any other ſon which B. ſhall have, one after another in form aforeſaid, and if B. die without heir male of his body, I having yet 136 years to come of the ſaid term, and having a purpoſe and deſire to have the ſame kept in my name, my will and meaning is, that the uſe, profit and occupation of the premiſſes ſhall remain and be unto S. for his life, and after him, unto the eldeſt ſon that S. ſhall have for his life, and after, ſuch ſon dying without heir male, to any other ſon which the ſaid S. ſhall have, one after another, in form aforeſaid; and if S. die without heir male of his body, to Richard, &c. with divers remainders over; and after A. makes the ſaid [B.] and S. his executors, and dies, and they adminiſter and agree to the legacy, and after the wife of B. dies, and B. dies without iſſue male, and S. ſurvives, and hath iſſue E. his eldeſt*

* [93.]

Ero. C. 230. S. C. the court inclined that the deviſe of a term in this manner to make a perpetuity cannot be good; For to limit a poſſibility

† Fol. 612.

after a poſſibility, and to limit

eldest son and J. his youngest son, and after makes his will, and by it devises all his goods and chattels to the said E. and makes the said B. his executor, and dies, and after B. enters, and makes F. his executor, and dies without heir male of his body, and after F. enters, and makes G. his executor, and dies; in this case G. hath good title to the land, and not the said J. who was the second son of S. for to entitle J. to the land by the will (who hath no other title thereto besides the will) B. ought to die without issue male, which is a limitation by intendment of a perpetuity, and the eldest son of S. (who was the surviving executor) scilicet E. (under whom G. claims) ought also to die without heir male, which is another limitation of a perpetuity by intendment before J. could have any thing by the will, and so a double perpetual limitation ought to determine before the remainder limited to the second son of S. who was the said J. could take effect; and though (as it was objected) here the estate is not limited to B. and the heirs males of his body, nor to the eldest son of S. and his heirs males, yet this is all one, though it be admitted that the executor of B. nor of such eldest son of S. should have it so long as the said B. and the eldest son should have issue male, for the second son of S. could not have it till B. and the eldest son of S. died without issue male; and in the mean time the executor of the deviser should have it, and this would be all one mischief to make such executory devises, which would be worse than any perpetuity, and no means to dock it. Mich. 7. Car. B. R. between Sanders and Cornish, upon a special verdict, per curiam resolved; and they gave a peremptory rule for judgment for the defendant, scilicet, Cornish the executor against the plaintiff, who was the second son of S. but after the plaintiff procured a day further till next term, and in the mean time the parties agreed; I being of the defendant's counsel. And vide my argument in my book.]

[3. If A. possessed of a term for years, devises it to B. his wife, for 18 years, and after to C. his eldest son for life, and after to the eldest issue male of C. for life, though C. had not any issue male at the time of the devise and death of the deviser, yet if he had issue male before his death, this issue male shall have it as an executory devise; for that although there be a contingent upon a contingent, and the issue not in esse at the time of the devise, yet inasmuch as it is limited to him but for life, it is good, and all one with Manning's case, 8 May. 14. Caroli, upon a reference out of chancery to justice Jones, Croke, and Barkly, between * Cotton and Heath, by them resolved without question.]

[4. If A. possessed of a term devises it to B. his wife, for life, and after her death to his children unpreferred, and after B. dies, C. then † being the only daughter of A. shall have it; for an executory devise that hath a dependance upon the first devise may be made to a person uncertain. Mich. 26, 27. Eliz. B. R. between * Amner and Lodington, per curiam adjudged, quod vide cited in Matthew Manning's case, Co. 8. 96. for it was uncertain whether, as long as B. lived, the daughter should have it, inasmuch as she might have

the remainder of a term after a dying without issue stand not with law. But the court would advise.

* S. C. cited by Ld. chancellor Nottingham, Sel. cases in chancery, 29. 35. and 51. in the D. of Norfolk's case.

† [94] * And 60. 61. pl. 135. S. C. adjudged. 2. Lo. 92. pl. 115. S. C. resolved per tot. cur. that the possibility should rise

well
enough on
B's death

been advanced in the life of B. and then she should have had nothing.]

to C. who was unpreferred; and judgment accordingly.—Godb. 26. pl. 36. Luddinton v. Amner 8. C. adjudged for the daughter.—3 Le. 89. pl. 128. S. C. adjudged.—Jenk. 264. pl. 66. S. C.—8 Rep. 96. b. S. C. & S. P. resolved, and that there is no difference when the term, or the lease, or the houses, and when the use and occupation, &c. is devised, and that in all these cases the devise executory is good, and that this was adjudged by both courts.

*Cro J.
459. pl. 6.
S. C. ad-
judged in B.

Vol. 633.

R. and
affirmed up-
on error in
Cam. Scacc.
—Jo. 15.
pl. 1. S. C.
affirmed in
error in
Cam. Scacc.
by all the
justices and
barons
except
Denham
and Tan-
field.—2
Roll. Rep.

[5. If a man possessed of a term for years devises it to D. his wife for life, and after to William his eldest son and his assigns, and if he dies without issue then living, to Thomas another son, this * is a void devise to Thomas, inasmuch as he cannot have it by the devise, unless the eldest son dies without issue, which is a perpetual limitation by intendment of law; though it was objected that it is limited that although he hath issue, yet if that issue be not living at his death, yet Thomas shall have it by the devise, for by the devise it is given absolutely to the eldest son and his assigns, and after it is devised to Thomas, if the eldest dies without issue, so that the assignee is to have it till the eldest dies without issue; and if men should be admitted to make such devises, there would not be any end of them, nor any certainty. 15 Jac. between * Child and Bayly, adjudged per totam Curiam in Camera Scaccarii, in a writ of error upon a judgment in B. R. where it was so also adjudged before per curiam; and the justices and barons said they would not admit a devise to be made to exceed the devise in Matthew Manning's case for the inconvenience they have seen by it.]

129. S. C. the remainder was held void.—Palm. 28. S. C. adjudged in B. R.—Ibid. 333. S. C. and judgment affirmed in the exchequer chamber against the opinion of Tanfield.—Select cases in chancery 34. in the Duke of Norfolk's case. Ld. C. Nottingham cites the case of Child v. Bailey, and makes his remarks on the reports of it, and Ibid. 35 says, that the record of that case goes farther, for the record says, that there was a farther limitation upon the death of Thomas without issue to go to the daughter, which was a plain affectation of a perpetuity to multiply contingencies. It farther appears by the record, that the father's will was made the 10 of Eliz. Dorothy the devisee for life held it to the 24th, and then she granted and assigned the term to W. he under that grant held it till the 31 of Eliz. and then re-granted it to his mother, and died; the mother held it till the 1 K. James, and she died; the assignees of the mother held it till 14 Jac. and then, and not till then, did Thomas the younger son set up a title to that estate, and before that time it appears by the record, there had been six several alienations of the term to purchasers for a valuable consideration, and the term renewed for a valuable fine paid to the lord. And do we wonder now, that after so long an acquiescence as from 10 Eliz. to 14 Jac. and after such successive assignments and transactions, that the judges began to lie hard upon Thomas, as to his interest in law in the term, especially when the reasons given in the reports of the case, were legal inducements to guide their judgments.

6. If the lessee for life devises his term by testament, to one for term of life, the remainder over to another, and dies, and the devisee enters and does not claim the term but dies, there he in remainder shall have it; but if the first devisee had aliened it in his life, there he in remainder had been without remedy thereof. Br. Chattles, pl. 23, cites 33 H. 8.

S. C. cited
Cary's Rep.
12.

7. A. lessee of a parsonage devised his intire lease, term, and interest to B. proviso, that if he die, living J. S. then the said lease, &c. should remain to J. S. during the residue of the term. B. sold the term. Montague Ch. J. and Hales J. held that J. S. had no remedy.—D. 74. 2. b. pl. 18. Mich. 6 E. 6. Anon.

8. A.

8. A termor devised his term for years to J. S. for his life, remainder to W. R. and made J. S. his executor, and died. J. S. died. All the justices held the remainder void; for the first devisee entered as executor, and never declared his intention by any act to execute the devise. But Welsh, Westton, and Harper, J. agreed that a remainder of a term devised to one for life is good by devise. D. 227. b. pl. 59 Trin. 10 Eliz. Anon. — The reporter adds a quære.

9. A termor devised his term to his son (then an infant) when he should be of full age; and willed, that his wife in the mean time should have the occupation and profits thereof, and made her sole executrix, and died; the widow proved the will, and sold the term, and afterwards the son came of age. Quære, what remedy the son has for the term? For the justices differed in opinion. D. 328. b. pl. 11. Mich. 15 & 16 Eliz. Anon.

10. A. being possessed of a term for 60 years, devised thus, viz, *I will that M. my wife shall have and occupy all the lands contained in the lease, for so many years as she shall live, and after her death I give and bequeath the residus thereof to B. my son, and his assigns, and made M. sole executrix*, and died. M. proved the will and entered, claiming only for her life, the remainder to B. this remainder was adjudged good, and this distinction was made by Manwood and Dyer, that in this case there was a separation of the jus possessionis from the jus proprietatis, for that the intire and mere right of the term is not devised to M. for any time, and yet she has an Interest by possibility in the intire term if she survives the 60 years. But after she made her entry into the land by virtue of the will, and had expressly declared her agreement to take it as a legacy, with remainder to B. according to the will, waiving her interest as executrix, she had no power afterwards to dispose of the term; so likewise, if A. had bequeathed the whole term to his son first, so that M. should have the occupation and use of the land during her life, this had been good, and she could not alien the whole term; and the words of the will plainly prove the testator's intent to restrain her from aliening the intire term. D. 358. b. pl. 50, 51, 52. Trin. 19 Eliz. Anon.

11. A termor devised his term to his son, and further said, that his will was that his wife should have the occupation and profits of the lease during the minority of his son, to the intent that with the profits she might educate his children and see his last will performed, and made her his executrix and died; afterwards she proved the will, and sold the term to a creditor of her husband's before all the debts were paid, having other goods in her hands sufficient to pay the debts and funerals. She educated the children after the baron's death, until her own death. The son came to full age and entered into the premises, and his entry was adjudged lawful. Pl. C. 539. b. Hill. 21 Eliz. Paramour v. Yardley.

12. A. being possessed of a term for years, devised it to M. his wife for life, remainder to her children unpreferred, and made her executrix. A. dies. M. assents to the legacies. She takes husband, who sells the term. M. dies. The children unpreferred enter.

S. P. and seems to be S. C. Pl. C. 519. Hill. 20 Eliz. C. B. Welkden v. Elkington. — S. C. Bendl. 308. pl. 296. adjudged accordingly.

Godb. 26. pl. 36. Pasch. 26 Eliz. B. R. Luddington

The

v. Amner
adjudged.
—2 Le.
92. pl. 115.
S. C. and
judgment
in C. B. af-
firmed in
error in
B. R.—

3 Le. 89. pl. 128. S. C. and same words unless where any are misprinted, as where 2 Le. has (oufter le main) which in the 3 Le. is, as it should be, (owel main.)—S. C. Jenk. 264. pl. 66.

[96] 13. A man possessed of a term for years in lands, by his last will devised the same *to one and the heirs of his body begotten*, made his executors and died; the devisee entereth by the assent of the executors, has issue and aliens the term and dies; this alienation bars the issue, for a term of years cannot be entailed. 4 Inst. 87. cites it as adjudged Trin. 28 Eliz. in B. R. in Peacock's case.

14. If term for years be devised to A. and if A. dies within the term, remainder to B. By descent of inheritance to A. Unity of possession, grant, or forfeiture of A. the remainder is defeated. Mo. 268. pl. 420. Mich. 30 & 31 Eliz. in the Exchequer. Lee v. Lee.

15. If land be devised for years to A. and if he dies within the years that B. shall have the residue of the years; no act of A. can prejudice the remainder to B. Mo. 269. pl. 420. Mich. 30 & 31 Eliz. in Scacc. Lee v. Lee.

16. But per Manwood otherwise it is, if one who has a term devises his term with such remainder, for if he devises his term it is all one compleat estate, by which power is given to first devisee over all the term for certain time; but it is not so where the land is devised. Mo. 269. Lee v. Lee.

S. C. cited
by 1d.
Coke 4
Inst. 87.

17. A. possessed of a term devised it to A. his wife, and B. his son for their lives, and after to C. his son and the heirs males of his body and died. A. and B. entered by force of the devise and died. C. sold his interest of his term, and had issue D. and died. Anderson Ch. J. and Walmesley J. to whom it was referred, held, that D. had no right to the lease; for per Walmesley J. D. cannot claim it as heir male, for that is not good to convey the interest of a term to him. Cro. E. 143. pl. 11. Trin. 31 Eliz. in Canc. Higgins v. Mills.

18. A. was possessed of a lease for years of a house, and divers other leases, and had issue B. the plaintiff, and C. the defendant, and E. a daughter; and by his will devised, *that E. should have the said house for her life, and if she chanced to die before C. then I will, that C. shall have it upon such reasonable composition as shall be thought fit by my overseers, allowing to my other executors such reasonable rates as shall be thought meet by my overseers*; and he devised all his other lands and goods to his executors, and made B. and C. his executors, and J. S. and W. R. his overseers, and died. E. entered by the assent of the executors and died during the term. Anderson, Walmesley, and Kingmill held that the whole term was in E. and the remainder

remainder void; and Anderson said, though a devise ought to be expounded according to the intent of deviser, yet this intent ought to be guided by the law, and that if such a devisee be ousted and is to bring his action, he ought to shew the certainty of his estate, which is the intire estate, and then if E. has the intire estate, the remainder to C. is void. Cro. E. 795. pl. 42. Mich. 42 & 43 Eliz. C. B. Woodcock v. Woodcock.

19. A devise was as follows, viz. the residue of all my goods, moveable or unmoveable, I give my son John, *whom I make my executor, and to him I give my whole years that I have in my farm of Mere-Court, and if he dies I give it to my daughters.* John the executor and devisee proves the will, claiming the lease according to the will and dies intestate. The administrators shall have the lease and not the daughters. 2 And. 185. pl. 105. Anon.

20. A. had issue, B. a son, and two daughters, D. and E. and having a lease, he devised all his lease and term of years to B. his son, and if B. died, then to D. and E. his daughters, and if the daughters died, then to his wife. A. made B. sole executor, who entered, claiming by the will, and after probate of the will died intestate. B.'s widow took administration and sold the term to J. S. Upon a case referred out of chancery, it was certified by Popham, Anderson, and Walmfley, that as this case is, J. S. the assignee ought to have the term, and the same was decreed accordingly. Trin. 1 Jac. Mo. 748. pl. 1028. Handal v. Brown, & al'. [97]

21. Lessee for years devised the profits of his term to his wife for life, the remainder to A. for life, if J. S. his son-in-law within two years after her death be not bound in 100 l. to pay 5l. per ann. to the said A. for her life, and if he do become bound, he devised the term to the said J. S. and the heirs males of his body, and if he dies without issue, he devised the remainder over. A. died within two months. J. S. never entered into a bond, but died having issue male, and the issue died during the continuance of the term. It was in this case holden, 1st, That it was a good remainder. 2dly, That the remainder limited to J. S. upon this condition precedent was good, and should take effect, although he never entered into a bond, for he had time to do it within two years; and then when A. died within the two years, the condition was discharged by the act of God, and so the remainder was good. Mo. 758. pl. 1049. Trin. 2 Jac. Foster v. Brown.

1bid. at the end of the case is a note, that special entry was made by the court in the roll, that they do not give judgment upon the remainder, but upon the release of later time procured from the executors.

22. Lessee for 60 years devised it to his wife and to his cousin for their lives, and afterwards to such persons as should remain in his house in Normington at the time of their decease; the cousin died, and the wife survived and assigned the term. Coke and Walmfley held, that this remainder was not good, because it was only a possibility. But Warburton and Daniel J. contra, and relied upon the authorities in Welcdeh's case, and Paramour's case, and Pierpoint's case. Et adjournatur. Cro. J. 198. pl. 26. Mich. 5 Jac. B. R. Mallet v. Sackford.

But see roll Devise (K) pl. 5. S. C. that no remainder can depend upon it but it is good by way of executory devise.

2 Brownl.
308. Dun-
male v.
Gyles S. C.
& S. P.
seems to be
admitted,
but the very point there is not exactly the same with this.

23. A man being possessed for a term, *devises the whole term to A. for life, and if he dies within the term, to B. during the minority of C. and that C. when he comes of full age shall have the remainder of the term, and held a good devise.* Brownl. 41. Trin. 6 Jac. Dunnal v. Giles.

12 Mod.
187. S. C.
cited by
Treby Ch.
J. and cites
Sid. 37. and
says that
if Man-
ning's case
were to be
adjudged
now it
would be
hard to
maintain it;
and Raym.
493. and
that setting
bounds to
them now
is like a
correction of
the judges that
gave them
countenance
first; and that
so says Hales
3 Keb. 178. 123.
that contingency
ought not to
exceed one or
two lives; for
that is a
reasonable
extent.

24. *Lessee for 50 years of a mill devised it to B. after the death of M. his wife, and that in the mean time his wife shall have the use and occupation thereof for life, she paying 7l. a year to B. during her life, and made M. executrix and died, leaving no assets besides the term. M. administered and entered, and paid the rent, and said that B. shall have the term after her death, and afterwards she died. Walmfley held the remainder void, but the other four J. held it a good devise to B. and that he took it not by way of remainder but by way of executory devise, and that there was no difference where one devises his term for life, the remainder over, and when he devises his land, or farm, or lease, or the use, occupation, or profits of the land, for the law will make such construction of the words as may answer the intent of the testator, and marshal them so that his will shall take effect.* 8 Rep. 94. b. Trin. 7 Jac. Matthew Manning's case.

25. *Lessee for 40 years devises the term to J. S. for term of his life if he shall live till it be expired, and if he dies before the years expire, then the remainder to F. for term of his life; Per Hutton and Harvey the remainder is not good.* Hutt. 74. Hill. 3 Car. C. B. Faulkner's case.

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26. *Cestui que trust of a term, with power to dispose of it by his last will devised it to B. his son and the heirs of his body, remainder to C. and charged it with divers legacies and annuities, and made B. his executor and died; B. for 1600 l. sold it to W. L. and C. being one of the annuitants, sold his annuity likewise to W. L. and released to him all his right in the term. B. died without issue, and the surviving trustee joined with C. in a grant of his interest to J. S. Per tot. cur. the assignment is not void against W. L. by the statute of fraudulent conveyances, but the remainder to C. was void, and yet the sale of B. had been good if there had been no assignment, but the assignment made it ill; and according to the opinion of the court the jury gave a verdict for the plaintiff.* Jo. 213. Mich. 5 Car. B. R. Baker v. Sir Wm. Lee.

27. *L. F. by will having a term for years, bequeathed it to his daughter C. but if it happens my daughter C. to die before she shall have accomplished the years of a lawful age, then the whole profits of the premises to remain and be wholly to W. my son; and if my son W. dies before the like lawful age, then all the profits of the said premises to remain to C. my daughter surviving; and if the said C. my daughter, and W. my son die before the like lawful age as aforesaid, having no issue of their bodies lawfully hereafter to be begotten, then*
all

all the whole term of the said lease, with the profits, &c. I give and devise to all my sisters children, to be equally divided and distributed amongst them. The question arising in the case being, whether the said C. who died at 18 years of age, was to be deemed of full age, according to the words of the will, and the meaning of the testator? His lordship and the judges are of opinion, that a lawful age in general words (unless it be in a particular case, as guardian in focage) must be construed and taken 21 years; and therefore are all of opinion that the said remaining term, according to the construction of the will, belongs to all the sisters children of the said L. F. Chan. Rep. 99, 100. 11 Car. Hartwell v. Ford.

28. A devise of a term of 2000 years to W. for 90 years, if he lived so long, remainder to the heirs males of his body, remainder to B. his brother for 90 years, remainder to the heirs males of his body, remainder over, &c. Bridgman Ch. J. held, the words (heirs of his body) were words of limitation, and therefore, *when he ceases to have heirs of his body* it is reasonable that the term limited by the devise shall cease, and the remainder being void, *this will go again to the executors of the first devisee*, who in this case was W. and therefore judgment was given for the plaintiff nisi, that the remainder were void. Sid. 37. pl. 7. Pasch. 13 Car. 2. C. B. Grigg v. Hopkins.

29. The testator being possessed of a term of 1000 years, devised it to M. his wife for life, remainder to A. in tail, and made his wife executrix, and died; A. granted the lands to B. for 1500l. M. the widow, executrix married the defendant, and then assented to the legacy. One question was, whether he in remainder could dispose of this estate during the life of M. the tenant for life? it seems he could not, because he had only a possibility, and this being by way of assignment, cannot pass by way of estoppel; because an interest passes by it. Sid. 188. pl. 16. Pasch. 16 Car. 2. B. R. Cookes v. Bellamy.

30. Devise of a term in trust for his wife for life, then to their two daughters, and their heirs, and if they die without heirs of their body, then to the right heirs of the testator. The daughters died intestate without issue and the mother administrated. The term was decreed to the mother and not to the right heirs of testator. Fin. R. 398. Mich. 30 Car. 2. Salter v. Stradling, Cleaver and Chaworth.

31. If all the remainder-men of a term are living at the time of the devise, it is good; but such remainder limited to a person not in being is void. Per Twisden J. said it had been so held. 1 Mod. 54. Hill. 21 & 22 Car. 2 B. R.

32. A termor for years devised the term to M. his wife, remainder to N. his son for life, and if N. dies without issue, then to B. &c. It was objected, that it was not to N. and his issue, in which case it was agreed that it should go to N. and his executors, and the remainder over void. But here the devise is to N. for life, and if he dies without issue, the remainder to B. and so has only an estate for life with an executory devise to B. upon the contingent of no

2 Ch. R. 177. S. C. accordingly—2 Ch. R. 235. S. P. per Chane. Nottingham in D. of Norfolk's case.

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Sid. 450. pl. 15. S. C. all the justices held the devise to B. void. For being devised to

N. and if he dies without issue then to B. B. cannot be intitled

till the death of N. without issue, and it is the same in effect, as if the devise had been to N. and the heirs of his body, remainder to B. which had been clearly ill.—Vent. 79. S. C. argued for the plaintiff.—Mod. 50. pl. 107. S. C. argued and debated, but adjournatur. There it is stated as a devise to the wife for life, after to N. for life, and if N. should die without issue of his body begotten, then to B.—2 Keb 637. pl. 64. S. C. and states it as in Mod. sed adjournatur.—2 Chan. Rep. 14. Windham v. Love. 21 Car. 2. in Canc. after the issue tried at law by direction of the said court, the court of chancery declared that B. the defendant there had no title.

33. Devise of a trust of a term for years to one for life, and afterwards to his issue, remainder over; decreed that this remainder is void, and that upon the death of the tenant for life, the whole term vests in the issue; and that if such issue die without issue and intestate, the residue of the term vests in his administrator. Fin. Chan. Rep. 279. Hill. 29 Car. 2. Warman v. Seaman & al'.

34. Lessee for years devised the lands to his wife for her life, and after her death to the heirs of her body, and for want thereof to J. S. and dies. The executor consents to the legacy, the wife dies without issue; the question was, whether the executor of the husband or the wife should have the residue of the term? Per Lord K. the testator meant an entail to the wife, which cannot be, because then there should be a perpetuity of a term; and though there be difference in words when land of freehold is devised to one for life, the remainder afterwards to his heirs, mediately or immediately, and where a term is so devised, the difference is in words, the testator's meaning is the same. 2 Chan. cases 236, 237. Mich. 29 Car. 2. Bray v. Buffield.

35. Devise of a term to his daughters after the death of his wife, whom he made executrix; she assented to the legacies, and assigned the term to one who had purchased the inheritance, having sufficient assets to pay her husband's debts; the term was decreed to the daughters. Fin. Chan. Rep. 378. Trin. 30 Car. 2. in case of Thomlinson v. Smith.

36. A man possessed of a term devises it to his son, and if he dies unmarried, and without issue, then all to go to his daughters and their executors, and if his son be married, and has no issue then living to enjoy it, then after the death of his son's wife, he devises it to his said daughters; adjudged that the devise to the daughters is void, being a limitation after the death of their brother without issue; for it is not to be taken (as objected) that the dying without issue is to be understood without issue living at his death, and so the contingency to happen within the compass of a life; and if it should be intended of such a dying without issue, yet the court held it would be void according to Child and Bailly's case; for though this has prevailed in case of a devise of an inheritance, as in Pell and Brown's case, yet it has never prevailed in case of a term; and the court said, they would not extend the devises of chattels to make perpetuities farther

farther than had been done before. 3 Lev. 22. Trin. 33 Car. 2. C. B. Gibbons v. Summers.

37. It is clear, that *the legal estate of a term for years*, whether it be a long or short term, *cannot be limited to any man in tail, with the remainder over to another after his death without issue, that is flat and plain*; for that is a direct perpetuity. Per Ld. Nottingham. 3 Chan. Cases 28. 33 & 34 Car. 2. in the Duke of Norfolk's case.

38. If a term be devised, *or the trust of a term limited to one for life, with twenty remainders for life successively, and all the persons in esse*, and alive at the time of the limitation of their estates, these though they look like a possibility upon a possibility, are all good, because they produce no inconveniency, they wear out in a little time with an easy interpretation. 3 Chan. Cases, 29. Hill. 33 & 34 Car. 2. cited by Ld. Chancellor Nottingham as Alford's case.

39. Where a term of 1000 years was devised to *D. for life, remainder to E. his son and the heirs males of his body, remainder over*; adjudged that the remainder over to the heirs males was void, because it is contingent, (i. e.) if there should happen, that any part of the term for years should remain after the determination of the estate for life; for *the law supposes, that every estate for life is of longer continuance than any estate for years*; and the remainder to E. is only a possibility. 3 Lev. 264. Trin. 1 W. & M. in C. B. Dowse v. Earle.

2 Vent.
126. Dowse
v. Cole.
S. C.

40. J. S. devised a leasehold estate to *Martin his son, his executors, administrators and assigns for ever; but if he died before 21, without issue*, in that case *he devises it over to his brother*. The question was, Whether the remainder over was good? it was objected, that it was a perpetuity, for that the remainder depends on Martin's dying without issue; for if he die before 21, though he leaves a child, and that child afterwards dies without issue, Martin may be said to be dead before 21, without issue; sed non allocatur, per Cur. Decreed the remainder over good. 2 Vern. 151. pl. 147. Trin. 1690. Martin v. Long.

And Ibid.
152. says a
like case
was cited
to be so
adjudged
in the Ex-
chequer
between
Smith v.
Smith.

41. A. devised a long term for years to his son *B. and the heirs male of his body, and if he die without issue living E. his mother, then it should go over to his son C.* The contingent happened, the devise over to C. is good upon the reason and authority of the D. of Norfolk's case. Cumb. 208. Trin. 5 W. & M. in B. R. Lamb v. Archer.

1 Salk. 225.
pl. 3. S. C.
the limita-
tion held
good, the con-
tingency aris-
ing within

the compass of a life; and the court denied the case of Child v. Bayly.—Skinn. 340. pl. 7. S. C. the court said, that here was not any of the inconveniencies of perpetuities; for the estate is not unalienable, but only during one life and this upon a contingency, which might determine within a little time, if the party dies; and judgment nisi, &c.—Carth. 266. S. C. the court without any difficulty held it a good limitation by way of executory devise to C. and that it did not tend to a perpetuity as was suggested, and denied the case of Child v. Bayly, but said, that the established law in cases of this nature is according to the resolution in the Duke of Norfolk's; and judgment accordingly.—12 Mod. 41. S. C. says that the words (heirs males of his body) in the limitation are void, but that the subsequent words are good; and the latter words will restrain the former and make them good, and that this differs from the case of Gibbons v. Somers, for there the dying without issue was indefinite.—S. C. cited by the Master of the Rolls. 2 Wms's Rep. 624. Mich. 1732.

42. A term of 1000 years, without impeachment of waste, was devised

vifed to the defendant L. *and if he died without issue, then to the plaintiff.* The plaintiff had got an *injunction to stop waste*, unless caufe; and it was alleged for caufe, that the plaintiff upon his own fhewing had no title, becaufe the devise to him after the death of the defendant * without issue, was void. It was objected that the devise was not to the defendant and the heirs of his body, as it was in the Duke of Norfolk's cafe; and that the words, if he died without issue, fhould be construed, *without issue living at the time of his deceafe*, which was agreed to be good, in cafe it had been fo expreffed. But here it was held per Lord Keeper, that this being a devise after dying without issue generally is void, and thereupon the caufe was allowed, for that it appeared the plaintiff could have no title, but that it went to the defendant, his executors and administrators. 2 Freem. Rep. 210. pl. 283. Hill. 1696. Burford v. Lee.

43. One F. being poffeffed of a term for years, devifes it to *his wife for life*, and after her death to *R. F. for her life*; and after her death to *T. F. and his children*; and then devifes in this manner, *and if it fhall happen the faid T. F. to die before the expiration of the faid term, not having issue of his body then living*, then to go over to the plaintiffs for the residue of the term; the defendant's title was by an affignment of R. F. and T. F. of all their eftate, right, title and intereft. R. F. was dead, and T. F. died without issue, and the plaintiff brought this bill to have an affignment of the term purfuant to the will; all that was infifted upon for the defendant to difference this cafe from the Duke of NORFOLK's of a term, and of PELL and BROWN's cafe of a fee, was, that this contingency of his dying without issue, was not confined to his own death, but that the words *(then living)* fhould relate to the words *(before the expiration of the term)* and fo this went further than any of the cafes had ever yet been carried, for he might have issue for feveral generations; and yet if fuch issue failed at any time before the expiration of the term, then it was to go over; and this, in a long term, tended plainly to a perpetuity, and therefore ought not to be allowed; but by the devise to T. F. and his children, and the fubfequent words *(and if he die without issue)* the whole term was vefted in him, and he might difpofe thereof as he thought fit; and it could not be reftained by the words *(then living)* which related only to the words *(before the expiration of the term)* and fo the remainder over to the plaintiff void; but for the plaintiffs it was argued and decreed, that the remainder to them was good by way of executory devise, and that the words *(then living)* muft relate to *the time of death*; for otherwife there would be no difference between this and the common limitations of a term to one, and the heirs or issue of his body; and if he dies without issue, the remainder to another, which is void; for there it muft likewise be intended, if he die without issue before the expiration of the term, he can limit no remainder over, becaufe nothing remains then to be limited; but here it being limited over upon this contingency, if he die without issue then living, viz. at the time of his death, it is good, becaufe the contingency muft happen

happen within one life, or not at all, for upon his death it will be certainly known whether he leaves issue or not; if he does, the contingency can't take place; if he does not, then it may; and this being to happen within the compass of a life, is good as an executory devise, and differs in nothing from the Duke of NORFOLK's case, save only that there it was by proviso; and also upon the death of another person, without issue then living; and here it is upon his own death, which makes no manner of difference. Abr. Equ. Cases 193. Trin. 1709. Fletcher's case.

44. A term was devised to A. during his infancy, and if he lived till 21 years, then to him for life, and to such of his children as he should leave it to, and if he shall die without issue, remainder over; and it was held good; for the dying without issue was construed to be restrained † to the death of the party. Arg. Gibb. 317. cites 24 May 1718. as the case of Targate v. Gaunt.

for life, which (to favour the intention) is construed to be the use. Gibb. 310. — Wms's Rep. 432. reports the devise to have been to * A. for his life and no longer, and after his decease to such of the issue of the said A. as A. should appoint by will, &c. A. died without issue living at his death. Ld. C. Parker held the devise over good. For it must be intended such issue as he should, or might, appoint the term to, which must be intended issue then living. Pasch. 1718. Target v. Gaunt.

* Wms's Rep. 432. has a note, that these words are not in the Register Book, though they are in all the reports, and seem to be the principal foundation of the decree. — 10 Mod. 403. S.C. according to Wms's Rep.

[† 102]

45. In case of the devise of a term for years, where the dying without issue is confined to a life then in being, a devise over is good; per Master of the Rolls. Ch. Prec. 549. Mich. 1720. Opie v. Godolphin.

46. A. being possessed of a term, devised it to B. and C. and if either of them die, and leave no issue of their respective bodies, then to D. The Master of the Rolls held, that the devise over was void, and that there is no diversity betwixt a devise to one for life, and if he die without issue remainder over, and a devise thereof to one for life with such remainder, if he die leaving no issue. Wms's Rep. 664. Mich. 1720. Forth v. Chapman.

S.C. cited Arg. Gibb. 317. — Upon appeal Ld. C. Parker reversed this decree and said, that if I de-

vide a term to A. and if A. die without leaving issue, remainder over, this in the vulgar and natural sense must be intended of leaving issue at his death and then the devise over is good, and that the word (die) being the last antecedent, the words (without issue) must refer to that. And the testator who is inops consilii will be supposed to speak in the vulgar, common and natural, and not in the legal sense of the words. And that the reason why a devise of a freehold to one for life, and if he die without issue, then to another is in favour of the issue, that such may have it and the intent take place; but that in case of a devise in like manner of a term for years, those words (if he die without issue then to another) cannot be supposed to have been inserted in favour of such issue, since they cannot by any construction have it. Wms's Rep. 666, 667. Trin. 1720. S.C.

47. One possessed of a term for years devised it to A. for life, remainder to the heirs of A. It seems this shall, on A's death, go to his executor, and not to his heir. 3 Wms's Rep. 29. Hill. Vac. 1729. Davis v. Gibbs.

48. A. tenant for life demised to trustees for 99 years, if she so long lived, in trust for herself during her widowhood, and after her marriage, then in trust for C. a second son, and the heirs of his body, and if he die without issue, then in trust for D. her next younger son. C. died intestate without issue. The question was, Whether the trust of this term should go to A. his mother, as administratrix to him,

And ibid. 609. the reporter says, *ideo* quære, though it seems rather to be

good limitation of the trust and within the reason of the Duke of Norfolk's case and the several other subsequent resolutions grounded thereupon.

him, subject to the statute of distributions, or to the next son in remainder? And for her it was insisted that the limitation over to D. after a limitation to C. and the heirs of his body, being only of the *trust of a term*, was void. To which it was said, that the only reason, why the trust of a term could not be limited to one and the heirs of his body with remainder over, was, because this would make a perpetuity, but here the whole term being to determine on A's death, there could be no perpetuity, as if she had made a lease to a trustee for 99 years, if she so long lived, in trust for C. and the heirs of his body; but if C. die without heirs of his body living A. then to D. this had been good. But as to this point the court gave no opinion. 2 Wms's Rep. 608. Trin. 1732 in case of King v. Cotton.

The editor in a note ibid. 631. refers to the case of *SABBERTON v. SABBERTON*. Mich. 1736. where upon a like limitation over of a

49. Devise of a term was to *J. S. in trust to raise money for payment of her debts and legacies*, and after to permit *B. to receive the rents for his life*, and after to his first, &c. sons in tail male, remainder to daughters, and in default of daughters, or in case of their death before *21, or marriage, then to *W. R. for the then residue of the term*. B. died without having ever had any issue. It was decreed by the Master of the Rolls, that J. S. convey the residue of the term unfold for payment of debts and legacies to B. 2 Wms's Rep. 618. 631. Mich. 1732. Stanley v. Leigh.

personal estate, a case was made by Ld. Talbot for the opinion of the judges of B. R. who certified the limitation to be good, the Ld. Hardwick in Mich. 1739. decreed agreeably thereto.

The Attorney general and Mr. Fazakerly cited the case of *STANLEY v. LEE or MEAD*, at the Rolls, and said, that upon the words, *if he died without issue* [but those words are not in 2 Wms's Rep. ut sup.] it was insisted that the limitation over should take place, and that those words *should be understood to be issue at the time of his death*, and was so allowed by the court; for that the limitations to the sons and the heirs of their bodies never taking place, the second limitation was good, there being no danger of a perpetuity. Cases in Chan. in Ld. Talbot's time. 23. in case of *Clare v. Clare*.

*[103]

50. W. H. being seised and possessed of a considerable real and personal estate, makes his will on the 16th of Feb. 1717. in these words; Item, I give and bequeath *all my real and personal estate unto my son F. H. and to the heirs of his body*, to his and their use, to be paid unto him in three years after my death, and during that time I make Sir *J. N. executor of this my will*, and after the said three years expired, I do appoint that my said son *F. shall be executor*; and if my said son *F. H. shall die leaving no heirs of his body living*, then I give and bequeath so much of my said real and personal estate as my said son shall be possessed of at his death to the *Goldsmith's Company of London*, in trust for several charitable uses mentioned in his will; but my will is, that the Company shall not give my said son any disturbance during his life. The testator dies, and after the three years *F. H.* takes upon him the execution of the will, and in some time after suffers a common recovery of the real estate; afterwards he makes his will, and the defendant his then wife executrix thereof, and then dies without issue. The court was unanimous, that the limitation over was void, as the absolute ownership had been given to *F. H.* for it is to him and the heirs of his body, and the company are to have no more than he shall have left unspent, and therefore

therefore he had a power to dispose of the whole; which power was not expressly given to him, but it resulted from his interest; the words that give an estate tail in the land must transfer the entire property of the personal estate, and then nothing remains to be given over. The bill was dismissed; per the Ld. Chancellor, the Master of the Rolls, and Ld. Ch. B. Reynolds. Gibb. 314. 321. pl. 11. Trin. 5 Geo. 2. in Canc. Attorney General v. Hall.

51. Devise of a term to *A. for life*, remainder to the children *A. shall leave at his death*, and if the children of *A. die without issue*, then to *B.* The children of *A.* die without leaving any issue living at the time of their death; this is a good devise over to *B.* 3 Wms's Rep. 258. pl. 64. Pasch. 1734. Atkinson v. Hutchinson.

52. Where the words of a devise of a leasehold would make an express estate tail in the case of a freehold, there a devise over of such leasehold is void; *secus* if the words in the former devise would in the case of a freehold make an estate tail only by implication. 3 Wms's Rep. 259. Pasch. 1734. Atkinson v. Hutchinson.

53. In ejectment at the sittings at Guildhall the following case was made for the opinion of the court; *J. S.* being possessed of a term, devised it "*To my wife for her life, and after her decease to such child as my said wife is now supposed to be with child and expected of, and his heirs for ever; Provided always that if such child as shall happen to be born as aforesaid, shall die before it has attained the age of 21 years, leaving no issue of it's body, then the reversion of one third part to my said wife, and the other two thirds to my sisters A. and B.*" The testator dying within a month after, the wife entered, and enjoyed during her life, but had no child or miscarriage; and upon her death the question was, Whether, as no child had ever been born, the remainders, limited upon his dying under 21 without issue, could take effect? And after several arguments, the court held that they might; that though formerly there had been opinions to the contrary, yet according to the law now settled, the devise to the infant in ventre sa mere was well limited, and if any child had been born, would have passed the term accordingly. Secondly, that though no child was ever born, yet the remainders are notwithstanding good; for there being no devisee, the devise, though void only ex post facto, falls to the ground as much as if it had been void in its creation, and this lets in the remainders immediately; that though the clause by which the remainders are limited is in words, strictly speaking, conditional, yet they do not make it a condition, but only a limitation. Lastly, That the contingencies must happen within a reasonable time, and therefore it may well operate by way of executory devise. Trin. 11 Geo. 2 B. R. Andrews on the demise of Jones v. Fulham.

the wife and two sisters was good, notwithstanding the wife was not pregnant with any child.

3 Wms's Rep. 304. Trin. 1734. in case of Studholm v. Hodgson S. P.

In confirmation of this opinion the court cited the case of Jones v. West-combs (reported in Abr. Eq. C. 245) and said they had seen the decretal order, by which it appeared that the same question arising upon the same will, and concerning the same premises, came before Ld. Harcourt, and that he was of opinion that the devise over of the reversion in thirds to

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(L. 2) Condition what, and what an Executory Devise.

1. **L**AND is devised to *A. and his heirs, and if he dies without heir, B. shall have it*, it is no good devise; but a devise to *A. and his heirs, if J. S. dies, living A. that B. shall have it*, it is good for it is a new devise and an estate created de novo, and does not depend as a remainder upon the first devise, or upon the first estate devised. Arg. 3 Le. 111. cites 29. Aff. 17. Br. Cond' 111. and Devise 16.

2. A man devised his term to his youngest son if he lived to the age of 25 years and did pay to his eldest brother so much money, and agreed no estate passeth till the age of twenty-five years and payment of the money, and the reason was, that a devise executory may depend upon a precedent condition. Winch. 116. cites 29 Eliz. Johnson v. Castle.

3. C. cited
2 Roll. Rep.
220. by
name of
Hoe v.
Gerrald
that it was
adjudged to
be a good remainder.

3. A man deviseth land to *A. and his heirs, provided, that if he die within age, that then the land shall remain to B. and his heirs*; adjudged a good remainder; for when he has only a limited fee a contingent fee may depend upon it; but that is not by way of remainder but executory devise. Palm. 136. cites 33 & 34 Eliz. B. R. Rot. 1140. Hoe v. Gerrald.

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4. M. seised of land in fee devised it to *B. his eldest son in fee, to the intent that he should pay certain annuities to C. D. and E. his younger children, and for default of payment, that his executors should enter and have the land and pay the annuities; and if the executors fail of payment, then C. D. and E. should enter and have the land*. M. died B. entered and before payment made feoffment; adjudged that this was a good executor's devise, and that the feoffment does not toll the entry of the children, because they were persons certainly known, to whom the limitation was made, there being a difference where the contingent estate is limited to a person certain and known, and where not, according to Archer's case and Wellock and Hammond's case; 2 Roll. Rep. 218, 219. Arg. cites it as adjudged, Trin. 42 Eliz. B. R. Pinloe v. Parker.

5. Brownl.
172. S. C.
Adjourn-
tur.

5. A lessee for 500 years devised his term to his father for life, remainder to his sister, and the heirs of her body. Resolved that this executory devise is good. 10 Rep. 46. b. Mich. 10 Jac. Lampet's case.

When a
particular
estate is li-
imited, and
the inheri-
tance passes
out of the
donor, this

6. When all the fee is given, or vested in a person, with a limitation of a fee to another upon a contingent; this cannot be a remainder but an executory devise; for a fee cannot remain upon a fee. But when part of the estate is disposed, as for life or in tail, and the residue given to another upon contingent, as to the right heir of J. S. who is alive, or to such as shall be living in the house at such a time, this

is contingent. 1 Lev. 11. Hill, 12 & 13 Car. 2. B. R. in case of *is a contingent remainder.*
Plunket v. Holmes.

and in abeyance. cites Plow. 35. a. But if the fee be vested in any person, and to be vested in another upon a contingency; this is an executory devise. Arg. Raym. 28. Mich. 13 Car. 2. B. R. in case of *Plunket v. Holmes.*

7. Devise to *infant en ventre sa mere* for fifteen years, remainder over is good by way of executory devise; per *Bridgman*. Raym. 83. Mich. 15 Car. 2. C. B.

8. Devise to *T. a son in fee, and if he dies without heir*, the remainder to a stranger or sister of the half-blood, this is void as a remainder and as a future devise; for if *T.* the brother died without heir the land escheated and the Lord's title would precede any future devise. Per *Vaughan* Ch. *J. Vaugh.* 270. Hill. 20 & 21 Car. 2.

9. *If my son G. and my two daughters M. and K. die without issue of their bodies, then all, &c. shall remain and come to my nephew W. R. and his heirs.* Here no estate is devised to the son and daughters by implication, the words only import a designation or appointment of the time, when the land shall come to the nephew, namely, when *G. M.* and *K.* happen to die issueless and not before, for no estate being created to the son and daughters, the nephew can take nothing by way of remainder; for that must descend to the heir at law. Now a remainder cannot depend upon an absolute fee simple, that being but the residue of an estate, for when all a man has of estate, or any thing else, is given or gone away, nothing remains, and no other or further estate can be given or disposed, and therefore no remainder can be of an absolute fee simple; yet in another respect an estate in fee may be devised to one and to be in another upon a contingency, as default of paying a sum, or such an one's dying without issue living the other, as 2 Cro. 590. *Pell v. Brown.* If lands are given not by way of grant, but by way of devise to *B.* and his heirs as long as *B.* hath heirs of his body, the remainder over, such later devise will be good, though not as a remainder, but as an executory devise, because somewhat remained to be devised when the estate in fee simple determined upon *B.*'s leaving no issue of his body. If a future devise may be upon any contingent after a fee simple, it may as well be upon any other contingent, if it appear that the testator intended his son and heir should have the land in fee simple. This way of executory devise after a fee-simple of any nature was in former ages unknown. It matters not whether the contingent which shall determine the fee-simple, proceeds from the person which hath such a determinable fee, or from another, or partly from him and partly from another; so here the fee-simple vested in *G.* by descent determines when he and his two sisters die without issue. *Vaugh.* 259. 270, 271. Hill. 21 & 22 Car. 2. C. B. *Gardner v. Sheldon.*

Preem.
 Rep. 11. pl.
 9. S. C. resolved by 3
J. contra
Tyrrrell.

10. *As to my dwelling house, and the houses which A. and B. dwell in, and the left over them, I give and devise to F. and P. and their heirs equally; saving, if W. the daughter of P. lives, she and her assigns shall enjoy the half-part.* Per Cur. this is no executory

tory devise, nor can be, but it is a good devise to W. presently, and judgment accordingly. 2 Keb. 660, pl. 16. Trin. 22 Car. 2. B. R. Robinson v. Carnaby.

2 Lev. 39. S. C. adjudged; for if the particular estate which supports contingent estates is not in esse when the contingent happens, it cannot arise but is destroyed for ever — 3 Keb. 11. pl. 15.

Purfrey v. Rogers. S. C. held accordingly. — 3 Salk. 299. pl. 5. cites S. C. adjudged; for that the wife's particular estate for life was merged in the conveyance of the inheritance to her and her husband and consequently when the remainder came in being there was nothing to support it; for it shall not be preserved by the possibility which the wife had to waive the estate conveyed to her by the bargain and sale, &c. after the death of her husband.

S. P. cited Arg. 2 Wms's Rep. 32. in case of Gore v. Gore S. C. cited by Ld. Talbot; cases in Chan. in Ld. Talbot's Time. 49. Mich. 1734. in case of Hopkins v. Hopkins.

12. Where a *contingent* is limited to *depend on* an estate of *frank-tenement* which is capable of supporting a remainder, it shall never be construed an executory devise, but a contingent remainder only. 2 Saund. 388. per Hale Ch. J. Trin. 23 Car. 2. in case of Purefoy v. Rogers.

13. Where a devise was to A. upon condition *to pay* a sum of money to B. in case of *failure that B. may enter*, it is no condition but an executory devise; said per Cur. to have been resolved, and that Mary Portington's case [10 Rep. 36.] was denied to be law in the case of Fry v. Porter in B. R. 2 Mod. 26. Pasch. 27 Car. 2. C. B.

2 Jo. 79. S. C. adjudged for the plaintiff, who claimed under the survivor. — Pollexf.

479. to 490.

S. C. argued by the reporter and adjudged for the plaintiff. — Freem. Rep. 481. pl. 658. S. C. states it that the eldest son died leaving issue. The court held that these are cross remainders vested; for though they are contingent as to enjoyment, because it is uncertain who shall survive, yet they vest presently; and judgment for the plaintiff.

Freem. Rep. 243. pl. 256. S. C. held accordingly.

15. B. deviseth to E. *his sister and heir for so long time, and until her son B. should attain his full age of 21 years, and after he should have attained his said age, then to B. and his heirs, and if he dies before*

before his age of 21 years, then to the heirs of the body of R. W. (the husband of E.) and to their heirs for ever, as they should attain their ages of 21 years. B. died under 21. living his father, and leaving M. his sister. R. W. died. In this case E. being executrix had a term till B. was of age, and she being heir, the land would else have gone to her, had there been no will, and he could never intend an inheritance to her to whom he had given a term, so that the fee vested in him presently, and he dying without issue, M. has a good title as heir at law, or she may take by way of executory devise as heir of the body of her father, which though it could not be whilst he was living, yet after his death she was heir of his body and was then of age, at which time and not before she was to take by the will. That E. had only an estate for years till B. should or might be of age; and so per tot. Cur. judgment for the defendant. 2 Mod. 289. Trin. 29 & 30 Car. 2. C. B. Taylor v. Biddal.

16. *In case of non-payment the legatees may enter and enjoy the profits of such and such land till satisfied.* No demand is necessary, for it is no forfeiture but an executory devise though there be a place and time appointed for payment Per Pemberton Ch. J. at the assizes. 2 Show. 185. pl. 190. Hill 33 & 34 Car. 2. B. R. Pierfon v. Sorrell.

17. J. M. having a son and four daughters, being seised of lands *in fee and of a long term*, devises all his estate in D. (where the freehold lies) and likewise in S. (where the term is) to his son and his heirs, and *if he dies without issue unmarried*, then to his four daughters, and if he marries and dies without issue then living, and having a wife, then after the death of such wife likewise, to his four daughters. Holt for the plaintiff, in the writ of error made 2 points, 1st, whether hereby an estate in tail of the freehold lands passed to the son, and the remainder to the four daughters; or whether the estate to the son was a fee, and it came to the daughters by way of executory devise; and that it was a fee to the son and good to the daughters by way of executory devise; he cited 2 Cr. 590. Roll. Estate. 835, 836. and this point was yielded by the counsel on the other side, but the other was opposed and not determined. Skin. 144. pl. 16. Mich. 35 Car. 2. B. R. Sommers and Gibbon.

18. If one devises his estate *to the heir of J. S. and J. S. is living*, the devise shall not be construed an executory devise, and such a devise is therefore void; but if it were *to the heir of J. S. after the death of J. S.* that is good, as an executory devise; so note the diversity inter verba de presenti & verba de futuro; per Cur. 1 Salk. 226. Hill. 5 W. & M. B. R. in case of Goodright v. Cornish.

12 Mod.
53. S. C.
& S. P.
by Holt.
Ch. J.

19. A. seised of lands in fee has issue two sons, B. and C. A. devised to B. *for 50 years, if he so long live*, and after the determination of them *to the heirs male of the body of B.* and for want of such issue, then *to C. in tail*, remainder to the right heirs of devisor, this is no executory devise; if it should, the limitations over are void. It must therefore be a contingent remainder, and then it is void,

2 Wms's
Rep. 56.
Arg. cites
S. C. and
says that
after the
words (If
he so long

live) are void, because there is nothing but a term of years to support it. the following words, viz. *And as for my inheritance after the said term, I do devise the same to the heirs male of my eldest son B.* And observes that though those words are proper words to introduce a new original executory devise, yet it was resolved, that they should not operate as an executory devise; and one of the reasons was, because they imported a devise of a remainder.

20. An estate in futuro and a contingent precedent makes an executory devise. Per Bridgman Ch. J. Raym. 83. Mich. 15 Car. 2. C. B.

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Carth. 309. S. C. held that the contingency not happening till after the particular estate was determined, the remainder is destroyed, as in Arthur's case. — 4 Mod. 282. S. C. adjudged in C. B. and judgment affirmed in

21. J. L. seised in fee, had three brothers A. B. and C. and devises these lands to *A. for life, remainder to the first son of A. in tail male, and so to the second and third sons; and for default of such issue to B. for life, and to his first, second son, &c. in like manner;* devifor dies, A. being unmarried; *A. marries and dies without issue born, but the wife was privement enfeint with a son who is born after;* judgment in C. B. was, that the posthumous son had no title, and it was affirmed here; and they held, that the remainder to the first son of A. was a *contingent remainder*, and so must take effect according to the rule in Archer's case; but at the time of the death of A. there was a default of issue male, on which the *estate vested in the possession of B. and shall not be removed again by the birth of a son* after. And this is no executory devise upon the rule laid down in 2 Saund. 388. where a contingent estate is limited to depend on a freehold capable to support the remainder, it shall never be construed an executory devise. This judgment was reversed in the house of lords. 12 Mod. 53. Pasch. 6. W. & M. Reeve v. Long.

B. R. — Skin. 430. pl. 6. S. C. and judgment in C. B. affirmed without any difficulty, per tot Cur. in B. R. — 3 Lev. 408. S. C. adjudged in C. B. and affirmed in B. R. — 1 Salk. 227. pl. 6. S. C. accordingly. — All the books mention that this was afterwards reversed in the house of lords, and 1 Salk. and 3 Lev. that the judges were very much dissatisfied with this judgment of the lords and did not change their opinions thereupon, but blamed baron Turton very much for permitting a special verdict to be found, where the law was so clear and certain. — Comb. mentions as the reason of the reversal, the lords having more regard to the equity of the case, than to the settled rules of law and the opinion of the judges.

22. If one limitation of a devise is taken to be *executory*, then all the subsequent limitations must likewise be so taken; for the several limitations of a devise of one and the same thing shall never be made to operate several ways, (viz.) some by way of executory devise, and others by way of remainder; per Pemberton serjeant, and not denied. Carth. 310. Trin. 6 W. & M. in B. R. Reeve v. Long.

23. Devise was that *A. B. shall take the issues and profits for fifteen years, nisi one of his cousin Ammos's daughters marry a Norton, and then to such daughter and her heirs, and if none of the daughters marry a Norton then to J. S. and his heirs*, this was ruled an executory devise, and that the fee was in the interim in J. S. but when one of the daughters married a Norton, the interest of A. B. ceased and the whole estate vests in the daughter. Arg. Skinn. 430. Pasch. 6 W. & M. in B. R. in case of Reeve v. Long. cites it as about 15 Car. 2. in C. B. *BATES v. AMMOS, sed non allocatur; For first this is directly contrary to Archer's case. 1 Rep. for the particular estate being determined before the contingency happened, the remainder never could attach, and it is necessarily

* Raym. 52. S. C.

a remainder and not an executory devise, for it never shall be construed an executory devise, but for necessity; where there is any particular estate to support it, there it will be a remainder and not an executory devise.

24. *Two things are requisite to make a devise executory, viz. It must be limited on estate in fee-simple, and ought to be limited on a condition; neither can any remainder be executory, where there is a particular estate to support it.* Arg. and of the opinion was the whole court. 4 Mod. 284. Pasch. 6. W & M. in B. R.

There must be a limitation after or upon a fee precedent and must be

to take effect upon a condition precedent in both which cases no remainder can subsist, and therefore the law for the sake of the testator and to perform his intent hath stretched itself to make it operate by way of executory devise, *ut res magis valeat*, Arg. and judgment accordingly. Carth. 310. in case of Reeve v. Long.

25. Devise to A. and his heirs, *if B. a stranger die without issue* is executory, because there is no precedent particular estate; otherwise if B. were tenant in tail reversion to devisor; for there is an immediate devise of a present reversion. 1 Salk. 233. Trin. 9 W. 3. in case of Badger v. Lloyd.

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Ld. Raym.
Rep. 526.
S. P. in
S. C.

26. A. having remainder in tail with reversion in fee, devises to one son in tail, remainder to the other in fee; this is good, because it alters the tenure; for there is a seignory and tenantry created, and tenant in tail must hold of him in reversion, and he of the supreme lord; so that this devise has a real effect, as to the tenure which is altered thereby. 1 Salk. 232, 233. Trin. 9 W. 3. B. R. Badger v. Lloyd.

Ld. Raym.
Rep. 523.
526. S. C.
& S. P. and
cites 2 Rep.
51. a
Cholmley's
case.

27. In ejectment a special verdict was found, viz. R. devised to *trustees for 11 years, and then to the first son of A. and the heirs males of his body, and so on to the second, third, &c. sons in tail male, provided they, the said sons, shall take on them my surname, and in case they or their heirs refuse to take my surname, or die without issue, then to the first son of B. in tail male, provided he takes my surname, and if he refuses, or dies without issue, then to the right heirs of the devisor.* A. had no son at the time of the devise, and died without issue, and B. had a son who was living at the time of the devise, who took the surname of the devisor; the whole court agreed, 1st, that the devise to the first son of A. was not a contingent remainder, but by way of executory devise, because the precedent estate is for years, which cannot support a remainder; for a contingent remainder can never depend upon a term for years, because of the abeyance of the freehold; nor can it be limited after a fee, because after such a disposal nothing remains in the owner to limit. 1 Salk. 229. Trin. 9 W. 3. C. B. Scatterwood v. Edge.

28. A. seised in fee, devised to *J. S. for 11 years upon certain trusts, and after he gave the said lands to the first issue male of B. and the heirs male of his body, and for default to the second, &c. provided they should respectively take upon themselves the surname of Edge, and if they should not take the surname, &c. or should die without issue male as above, then to the first issue of C. (who at the time of the devise had issue a son, which B. had not) with limitation to the second, third, &c. and the same proviso as above; and if they should*

If it had been to J. S. for 11 years the remainder to first issue of B. Powell J. said he would perhaps

construe it as an executory devise and make it good if B. should

should not assume the name, then to D. for life, and after to the heirs male of his body, remainder *to the right heirs of A.* Adjudged per three justices, contra Blencow, that this is an immediate, and not an executory devise. 12 Mod. 278. Pasch. 11 W. 3. C. B. Scattergood v. Edge.

have issue during the eleven years, otherwise not; and that is according to Bates and Amerst's case; for as a marriage of one of the daughters with a Norton would not be good after the fifteen years, so here an issue born after the eleven years should not take; and if the devise had been to the first issue to be begotten of B. then he said he would give it to any issue born during the life of B. but he would not extend it to posthumous son. Per Powell J. 12. Mod. 285. Scattergood v. Edge.

If the devise to the first son of A. be good then the devise to the first son of B. is not good; but if that to the first son of A. be bad, then this to the first son of B. is good; had the son of A. been before the court, the judgment must have been against him, because as a remainder it was void, and as an executory devise it was void; for these are *either present or future*; if *present the party must be in esse and capax at the time*, or all is void; like a devise to the right heirs of J. S. who is living, this is a present devise, and therefore not like the case of an infant in ventre sa mere. *Where future they must arise within the compass of a life*; no longer time has yet been allowed. And he was not for prolonging the time in favour of these inconvenient estates. Secondly he held the devise to the first son of A. was not a precedent condition, but a precedent estate attended with these limitations; judgment was given for the defendant, per Treby Ch. J. and afterwards affirmed in B. R. 1 Salk. 230. Trin. 9. W. 3. C. B. in case of Scatterwood v. Edge.

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1 Salk.
232, 233.
Pl. 11. S.
C₂

29. Devise to *A. in tail*, remainder to *B. in tail*, remainder to *C. in tail*, and if *C. dies without issue, A. and B. being dead, then to D. in tail*; this is a remainder vested in D. and not contingent. Ld. Raym. Rep. 523. Hill. 11 W. 3. B. R. Badger v. Lloyd.

30. If devise be to the heir at law, paying such and such legacies, &c. and for default thereof remainder over; the heir, till default, is in by descent, and the other's interest is by way of executory devise. It is hard to maintain, either by use, or devise, a remainder to a stranger after a present fee to one that is not heir at law. 6 Mod. 241. per Holt. Ch. J. Mich. 3 Annæ. B. R. Anon.

31. Devise was of lands to his wife for life, remainder to *C. his second son in fee, provided if D. his third son, shall within three months after the wife's death pay 500l. to C. his executors, &c.* then he devised them to *D. and his heirs.* D. died, living the wife; then the wife dies. The heir of D. may enter upon the lands upon payment or tender of the 500l. It is not a condition, but an executory devise. 10 Mod. 420. Mich. 5 Geo. 1. Marks v. Marks.

32. T. C. being tenant for life, with remainder to his wife for life, remainder to his own right heirs, 20th October 1683. made his will, viz. Item, my land at *W.* my wife *Mary* is to enjoy for her life; after her death it of right goes to my daughter *Eliz.* for ever, provided she has heirs, but if my said daughter dies before her mother or without heirs, and my said wife *Mary* shall marry again and should have heirs male, I bequeath all my said right in *W.* &c. to her heirs male by her second husband, thinking I can never sufficiently reward her love. Provided, if my said wife should marry again, and fail of heirs males, and my daughter should fail of heirs, then I devise 50l. annuity out of *W.* &c. to my brother *Jos. C.* and devised several other annuities charged on the land to several persons who were his heirs at law, but he made no devise of the land to any one. *Mary* the wife died before *Elizabeth* the daughter, who died without heirs, but *Mary* married.

married a second husband and had issue male. In ejectment lessors of the plaintiff, were heirs at law, and the defendant was the heir male of the wife by the second husband. On trial a case for the opinion of the court.

The first objection was, that the first clause was a devise to the daughter in fee, but yet that was afterwards controuled and qualified by subsequent words, and it was intended to be to her and the heirs of her body only. Said per Cur. the person to whom the devise over is, i. e. heirs male of the body of the wife by a second husband he is a stranger, and where the devise over is to a stranger, that will not alter the construction of the will from what it would have been without it; so that it will continue a devise to Eliz. in fee simple. So is * 2 Cro. 415. and it is law now, and not to be drawn in question though it was once disputed. A devise to a stranger will not alter a positive devise to a person and his heirs. But when this devise is over of a rent-charge, or annuities charged on the land to the heirs at law, that shews what was meant by heirs in the first place, and then it will be a devise to Eliz. and the heirs of her body, remainder to the heirs males of the body of the wife, with a devise over to these annuitants, and there is no difference whether the devise over be of the lands or of an annuity charged on them, because in the last case he could never intend the lands themselves should pass to the persons to whom he had given the annuities. 2dly. but per Cur. the first clause is not a devise to the wife or to Eliz. for they were settled upon her for life, and what is said as to the daughter is only a declaration of the deviser, what the estate and condition of the estate was, and how she was to enjoy it, and he could not say of right we was to enjoy them if she claimed under the will. The consequence of this is, that the lands descended to Eliz. as heir at law, and the devise to the heirs males of the wife by the second husband will be contingent; first, whether Eliz. should die in the life-time of the wife, which must happen within the compass of a life; next contingency, if the wife should marry, &c. and have heirs of her body by a second husband. But though as in *Lloyd and Carey's* case she might have heirs after his death and not within the compass of a life, yet so near as there could be no inconvenience if it should take effect an executory devise in such a case. But this is not so here; for if the words are taken disjunctively, (*if my daughter dies in the life of her mother, or without heirs*) the contingency never happened because the daughter survived the mother, so the devise could never take effect but will be void; if taken copulatively, and (or) taken for (and) here it will be hard to turn words out of their natural sense and import unless there be a plain intimation of the intent of the deviser so to do. How doth the deviser intend it (copulatively?) what occasion is there for it? For if the daughter survived the mother, he might intend it for her in fee; why should it be taken, if my daughter dies without heirs in the life-time of Eliz. 3dly, but if it were so, the devise over cannot take effect, because the contingency never happened. 4thly, But the death of the daughter without heirs is too remote, and the devise over is void. The devise of the annuities is

* Hill. 14
Jac. B. R.
Webb v.
Hearing.

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to take effect in nature of a remainder, and if the first cannot take effect, all that comes after cannot take place, it being not to take effect but as a remainder, and then not at all. Next (if the wife should marry again and have a son, and should die without heirs males) this is also too remote, and so the devise over is void, because to commence upon a contingency too remote, and if it cannot be good by way of executory devise, then it must be by way of remainder, and it cannot be good as a remainder, because there is no particular estate to support it to any one; for there was no particular estate at all, what went before being only a declaration of what did belong to the daughter, and as this contingent remainder had no particular estate antecedent to it, it is void. Not good as an executory devise, because the contingency never happened, or if it did happen it was too remote and so void, and therefore the heirs at law have good title. 5thly, If the son of the wife by the second husband could take, he would take fee-simple, so that the testator was mistaken in the law; for he thought he had devised to him but an estate tail. Judgment for the plaintiffs. MS. Rep. Pasch. 7 Geo. B. R. Wright v. Hammond.

33. A term for years was devised to A. for life, remainder to B. This is an executory devise. 9 Mod. 101. Mich. 9 Geo. Theobalds v. Duffoy.

34. A devise of lands to R. B. and his heirs for ever, upon condition he pay all my debts, and legacies and funerals, and if he do not pay them, then I devise the premises to E. F. (the defendant) and her heirs for ever. And as to all the rest and residue of my real and personal estate whatever, not before herein bequeathed, I give and bequeath to E. F. and her heirs; the devisee R. B. died before the deviser, so it was a lapsed legacy, and the first question the counsel made, was, whether this was executory devise to E. F. By Ch. J. Eyre, & tot. Cur. this cannot be an executory devise to E. F. unless it were an original devise, here is no first devisee, for he is dead and that devise is void. Fortescue's Rep. 184, 185. Pasch. 2 Geo. 2. C. C. Roe v. Fludd.

[112] 35. A. having the reversion in fee of lands settled upon the marriage of B. his son in the usual manner devises all the lands in that settlement on failure of issue of the body of B. and for want of heirs male of his own body, to his daughter F. and the heirs of her body. This will does not give an estate tail by implication to B. the devise to F. is executory and is void, as being on too remote a contingency. Cases in Equ. in Ld. Talbot's time, 262. Pasch. 1733. Laneshorough v. Fox.

36. A. devises his freehold, copyhold, and leasehold, and all his real and personal estate not before devised to three trustees, their heirs, &c. in trust to pay his son B. an annuity; and if he should have any child, or children the residue of his rents, during B.'s life, for the education and benefit of such child or children; and after B.'s decease a moiety of the trust estate to such child and children as he shall leave, their heirs, &c. the other moiety to his grandson C. and every other child and children of his daughter S. their heirs, &c. And if B. die without issue, the first moiety to C. and other child or children of S. and

and their heirs, &c. and directs an annual payment to such wife as B. shall marry. The testator died; B. married and had issue a son and daughter, and died; afterwards C. married, and had issue a daughter, and died; the limitation to the daughter of C. is well supported by the estates in the trustees; or if not, is good as an executory devise, and the profits, &c. shall go to the children of B. Cases in equity in Ld. Talbot's time, 145. Mich. 1735. Chapman v. Blisset.

37. An executory devise of an estate of inheritance to a person unborn when he shall attain the age of twenty-one years is good; and there is no danger of a perpetuity. Cases in equity in Ld. Talbot's time, 228. Mich. 1736. Stephens v. Stephens.

38. Testator devised to A. and his heirs, and if he die before twenty-one, then to B. and his heirs. A. died before twenty-one, but B. died before him. The question was, whether B's heirs should take. It was objected, that the limitation to B. upon the contingency of A's dying without issue, was but an *executory devise*, and that such devises have always been construed as possibilities only, and upon that foundation can neither be assigned, devised, barred by a common recovery, nor descend. But the court held clearly, that, though B. died in the life of A. yet his heirs might well take under the executory devise; for that such a devise is not to be considered as a mere possibility, but as an interest vested (though not in possession) in the same manner as a *contingent remainder*, and consequently is *transmissible*. Adjudged upon a case made at the assizes, and reserved for the opinion of the court. Trin. 13 & 14 Geo. 2. Gurnel v. Wood.

per Ld. Talbot; and the decree affirmed after a long hearing in the House of Lords March 1735.

In this case the Ch. J. cited the case of KING v. WITHERS 11 July 1735. where a contingent devise of a personal estate was held to be not a possibility only; but an interest vested and transmissible.

(L. 3) Executory Devise.

Of what it may be.

1. A *rent de novo* was devised to A. for life, remainder to B. in tail, adjudged that this was a good rent and remainder and not an executory devise of the rent after the death of A. the devisee for life, and that it was barred by a common recovery suffered by B. Lev. 144. Mich. 16 Car 2. C. B. Smith v. Farnaby.

and that it was by way of remainder, and not by way of executory devise, and therefore barred by the common recovery, and judgment in C. B. affirmed. — Cart. 52. S. C. states it as a devise to A. in tail, remainder to B. in tail, the whole court agreed it to be a remainder; but Bridgman Ch. J. in delivering the opinion of the court said, it is true I may make a rent executory, but then the intent ought to be apparent; and the court is not to conceive that a person that supposed to be inops consilii, is so well acquainted what an executory devise is, as to say, I do not intend it an executory devise, and so the remainder shall not be cut off; if he had thought of this he would have had other words.

Sid. 289. 20. S. C. B. R. but states it as a devise, A. in tail, remainder to B. in fe

(L. 4) Executory Devise.

Notes, and Rules.

Since the
statute of
Wills and
statute of
Uses, execu-
tory devises
and spring-
ing uses
have been
allowed of.
These were

first allowed of with respect to the testator or party himself; afterwards it came to be allowed of to other persons. And therefore at this day, in devises and limitations of uses, an estate may be limited over to a third person upon the defeasance of a former estate in fee, if the condition be not too remote in point of time; and though there have been words found out to save, in appearance, the maxims of the common law, yet in effect and in truth the very benefit and advantage of the condition is passed over to a third person; notwithstanding the maxim of law, that a stranger can't take advantage of a condition; per Parker C. 10 Mod. 423. Mich. 5 Geo. 1. in case of *Markes v. Markes*.

1. **EXECUTORY** devises were grounded on the common-law, as Isabel Goodcheap's case 49 E. 3. 16. 2. cited in *Ld. Stafford's case*. 8 Rep. 6. b. 7 Rep. 9. a. 11 H. 6. 73. a. Br. Devise 32. and the words of the *Statute of 32 H. 8.* are not that he devises to any person or persons, but at *his will and pleasure*, and cited Cro. J. 394. *Blandford v. Blandford*. Per *Bridgman Ch. J.* and adjudged accordingly; Raym. 83. Mich. 15 Car, 2. B. R. in case of *Bate v. Amherst and Norton*.

2. As to contingent estates, if the *particular estates* that support them be *not in esse when the contingent happens*, they cannot arise, be it by surrender, merger, or feoffment, or any other way. 2 Lev. 39. Hill. 23 & 24 Car. 2. B. R. in case of *Purefoy v. Rogers*.

3. It was argued, that an executory devise *need not vest, as a remainder must, eo instante, that the particular estate determines*; but that the law would support it without a particular estate, and expect till it could take; but North answered, that then there must be an apparent intent of the devisor, that it shall not till a certain time, notwithstanding the particular estate determines, and that he said was the case of *Snow and Cutler*; for there the devise was to the heir of J. S. when he comes to the age of 14. But if there be no such apparent intent, it must stand and fall by the rules of law. *Freem. Rep.* 244. Hill. 1677. in case of *Snow v. Cutler*.

4. *Favourable distinctions* have been always admitted to supply the meaning of men in their last wills; and therefore a devise to A. till he be of age, then to B. and his heirs, this is an estate for years in A. with a remainder in fee to B. And if such a devise to A. who is also made executor, or for payment of debts, it shall be for a certain term of years, viz. for so long as according to computation he might have attained that age had he lived. Contingent remainders are at the common law and arise upon conveyances as well as wills; one may limit an estate to A. the remainder to another, and so it may be by devise, if the intent of the parties will have it so. But as at the common law all contingent remainders shall not be good, so in wills no such latitude is given, as if none could be bad; they are subject to the same fate in wills as in conveyances; Per North Ch. J. 2 Mod. 291. Hill. 29 & 30 Car. 2. in C. B. in case of *Taylor v. Biddal*.

5. An executory devise needs no particular estate to support it, for it shall descend to the heir till the contingency happen; it is not like a remainder * at the common law, which must vest eo instante that the particular estate determines; but the learning of executory devises stands upon the reasons of the old law, wherein the intent of the devisor is to be observed; for when it appears by the will that he intends not the devisee to take but in futuro, and no disposition being made thereof in the mean time, it shall then descend to the heir till the contingency happens; but if the intent be that he shall take in presenti, and there is no incapacity in him to do it, he shall not take in futuro by an executory devise. Per North, Ch. J. 2 Mod. 292. Hill. 29 & 30 Car. 2. C. B. in case of Taylor v. Biddal.

6. A will shall never operate by way of executory devise if it may take effect by way of remainder, that is, if there is a particular estate sufficient to support it. Per Cur. Carth. 310. Trin. 1 W. & M. in B. R. Reeve v. Long

7. Nothing shall be construed by way of executory devise, if it will admit of any other construction. Arg. says, it is a known rule in law. 4 Mod. 258. Hill. 5 W. & M. in B. R. in case of Goodright v. Cornish.

8. In case of executory devises, there can be no limitation over. 4 Mod. 259. Hill. 5 W. & M. in B. R. Goodright v. Cornish.

Mod. 284.
in case of
Reeve v.
Long.

9. Ever since the case of Pells v. Brown executory devises have been allowed; not absolutely upon a dying without issue, but dying so in a particular time, for otherwise estates might be continued to perpetuity, which the policy of the law will not endure. Arg. 4 Mod. 282. Pasch. 6 W. & M. in B. R. in case of Reeve v. Long.

10. An executory estate to rise within the compass of a reasonable time is good; that twenty, nay thirty years have been thought a reasonable time. So is the compass of a life or lives; for let the lives be never so many, there must be a survivor, and so it is but a length of that life; (for Twisden used to say, the candles were all lighted at once) but they were not for going one step farther; because these limitations make the estates unalienable, every executory devise being a perpetuity as far as it goes, that is to say, an estate unalienable, though all mankind join in the conveyance; per Cur. Salk. 229. Trin. 9 W. 3. C. B. Scatterwood v. Edge.

11. There are three sorts of executory estates, one where the devisor parts with his whole fee simple, but upon some contingency qualifies that disposition, and limits another fee upon that contingency, which is altogether new in law, as appears by 1 Inst. 18. a fee cannot be limited upon a fee. The second sort is, where he gives a future estate to arise upon a contingency, and does not part with the fee at present, but retains it, these are not against law; for by common law one might devise, that his executor should sell his land, and in such case the vendee is in by the will, and the fee descends to the heir in the mean time. A third sort of executory devises is of terms, which are well settled in Matthew Manning's case;

12 Mod.
281. S. C.
and S. P.
by Powel J.
and as to a
sale by the
executor
the same
when made
deveats the
freehold
and inheri-
tance by act
of law out
of the heirs.

or lord by escheat, and even out of the king, if he were lord by escheat, without petition or monstrans de droit, and cites 29 E. 3. 16.

* Cro. J.

590. 592.

Mich. 18

Jac. B. R.

—Bridgm.

1. S. C. by

name of

Petts v.

Brown.

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and it is dangerous to extend the boundary of these executory devises, which at present is a life or lives. Per Powell J. 1. Salk. 229, 230. Trin. 9 W. 3. C. B. in case of Scatterwood v. Edge.

12 The first of these devises that we find, is Wellock and Hammond's case, cited 3 Co. Boraston's case. Cr. El. 204. 2 Leon.

114. and was first countenanced in favour of provision for younger children, and of land devisable by custom* in Pell and Brown's case; Doderidge did oppose the opinion of the other three judges, as to the point of its not being barred by recovery, and the opinion in 1 Roll. Rep. 835, 836. and Sty. 274. went down with the judges like chopped hay, but since it has been so often passed over, it must not be questioned now, because the estates of many depend upon it; 12 Mod. 281. Pasch. 11 W. 3. in case of Scattergood v. Edge.

13. For estates to pass by executory devise is only an indulgence allowed by the law, where otherwise the words of the will would be void. Arg. 8 Mod. 223. Hill. 10 Geo. 1.

14. Every executory devise is to be considered as an original devise not depending upon any precedent estate given by the will, but is an estate, which is to arise and spring up in possession at the time appointed for that purpose, and then and not till then to take effect as a legal and alienable estate. And in the mean time the devise is rightly and properly called an executory devise. Arg. 2 Wms's Rep. 39. Trin. 1722. in case of Gore v. Gore.

15. A construction in favour of executory devises to support the intent of the testator, will be made either in the said courts of law or equity, if it may be done consistently with the rules of law. Cases in Equ. Ld. Talbot's time. 44. Mich. 1734. Hopkins v. Hopkins.

16. The rule that a limitation which may enure as a remainder shall never be construed to be an executory devise is true; but this only upon a supposal that the party's intent was, that things should go according to the ordinary forms, but where they cannot, there extraordinary methods are used to serve the intent. A devise to A. for life, remainder to B. and a devise to a monk, remainder over; A. dies in the testator's life-time; B. shall take by way of executory devise; and in the latter case, immediately upon the testator's death the remainder-man shall take; and yet, if either A. had out lived the testator, or the monk been deraigned in the testator's life-time, in both cases the second limitation must have been a remainder. Cases in Equ. in Ld. Talbot's time, 47. Mich. 1734. Arg. in case of Hopkins v. Hopkins.

(N) *What Things shall be said to be devised by the Will.*

N. B. These is no (M) in Roll.

[1.] IF a man, seised of three tenements of socage lands in fee, and possessed of divers goods, and of a lease for years of certain lands, devises one tenement of the socage lands to one of his sons, and another tenement to one of his daughters; and in another clause of the will it is, *item, I make my two sons, scilicet, Richard and Richard, my executors of all my goods moveable and immoveable, and all my lands, debts, duties, and demands*; by this clause, no estate in the three tenements of which the devisor was seised in fee passed to the executors by force of the words, and all my lands, because that *these words might well be satisfied by the lease for years of land which passed by it*, and it appears, the intent of the testator was not to pass the fee simple lands, because then this would pass an estate as well in the lands which he had before devised to one of his sons and to his daughter, and so the will would be repugnant. Trin. 15 Jac. B. R. Rowse against Stanning, adjudged upon a special verdict. (Also it seems that this is not an express devise, but he says, that he makes them executors of his land, &c. which must be intended of such things as belong to executors.)

[2.] If A. having nine children, and possessed of a lease for years, devises it in this manner; *I devise my two rectories (of which the lease was) to be divided between my children, and that all the profits thereof shall remain between my children, and if my son Richard dies, then the two daughters of Richard shall have his part; and if any of the rest of my children dies, then his part shall come unto my children; and after four of the nine children die, by which an equal part of these four parts came to Richard, and after Richard dies; and per curiam the daughters of Richard shall have only the ninth part, which was first devised to Richard, and nothing of the four parts which by the future devise came to Richard by the [death of the] other four children, for the devise to them is limited to the first part of Richard, and the future devise upon the death of the other children comes after this limitation.* Mich. 10 Car. B. R. between Rimer and Belcher, adjudged per curiam upon a special verdict clearly without argument. Intratur, Trin. 9 Car. B. R. Rot. 988.]

[3.] If a man be seised in fee of two houses in D. adjoining the one to the other, and one is in the possession of R. and the other in the possession of B. which is also the corner-house in the street of the town, and he devises his corner-house, in the possession of B. by these words only; * this house, which is in the possession of B. shall pass, which is the corner-house, and not the other house, which is in the possession of R. though it be next adjoining thereto, for his intent appears to be so. Hill. 11 Car. B. R. between Blake and Gold, per curiam, adjudged upon a special verdict, for an

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house

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Cro. C. 447.
pl. 19.
Blagne v.
Gold. S. C.
states it

Fol. 614.

that Blagne
was seised
in fee of two

houses in Andover, the one called house in Andover in comitatu Southampton. Intratur, Hill. 10 Car. Rot. 752.]

ed the corner house, in the tenure of one Binson and Nott, and of another house thereto near adjoining, in the tenure of Hitchcock. He devised his house called the corner house in Andover, in the tenure of Binson and Hitchcock, to J. S. in fee. Whether the house in the tenure of Hitchcock, adjoining to the corner house, shall pass or no, was the question? And resolved, that it shall not; but only the corner house in the occupation of Binson and Nott (if they occupy jointly) shall pass; but if they occupy severally, viz. one part in the tenure of Binson, and the other part in the tenure of Nott, severally, then only that in the tenure of Binson shall pass, and not the residue in the tenure of Nott; wherefore rule was given, unless other cause were shewn to the contrary, that judgment should be for the plaintiff. The case was cited as before, but only this clause added which was in the will (viz.) upon condition that the same be new built according to the covenants betwixt me and Bernard Calvert. And it was found that the covenants with Bernard Calvert were for the re-edifying of the said corner house. Adjudged by three justices absente Brampton, that the corner house only passed by the will, and not the house adjoining, in the tenure of Hitchcock; for although the corner house was not in the tenure of Hitchcock, but a misprision, yet the devise is good; for it is sufficiently ascertained before, viz. the corner house in Andover. And the addition in tenura Hitchcock, although it be not in his tenure, and is a mistake, yet it is but surplusage.

S. C. Sty. 261. 278. and the court inclined that the wife should have the portion of tithes by those words in the will. —S. C. cited Arg. 70 Mod. 525, 526. —9 Mod. 74. Arg. cites S. P. as adjudged.

[4. If *M.* seized for life, the reversion in fee to *A.* of a portion of tythes in *D.* and *A.* hath not any other land or hereditament in *D.* and makes his will in writing in this manner; if my wife, who goeth with child, be delivered of a son, then I give to my brother *B.* 100*l.* but if she be delivered of a daughter, then I devise all my fee simple lands whatsoever to the said *B.* and his heirs for ever, upon condition that my wife shall hold and enjoy my free-land at *D.* after the death of *M.* my mother; and after appoints other provision for the daughter if his wife should be delivered of a daughter, afterwards *A.* dies, and his wife is afterwards delivered of a daughter, in this case the said portion of tythes shall pass to *B.* by this will by the words of all his fee simple lands whatsoever, for otherwise his wife should not have it, nor is the will of any effect, he not having any lands or hereditaments in *D.* to supply it. Trin: 1651. cited Saunders and Rich, per curiam, adjudged upon a special verdict. Intratur, Hill. 1649. Rot. 758.]

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5. Devise of the Swan in Ipswich to his eldest son *A.* for life, remainder to *B.* son of *A.* in tail male, remainder to the right heirs of the deviser, and to the heirs male of his body; father and son died without issue male. The father is tenant for life, remainder to the son in tail, remainder to the father in tail, the reversion to the father in fee. So the daughter of *B.* has the same reversion by descent after the entails spent. Le. 188. Anon.

Arg. Roll. Rep. 249. cited as the case of Fenton v. Foster, and says that he had seen a report of it.

6. A termor of a house for 40 years devised the house to *J. S.* without limiting any estate, the devisee shall have the intire term, for he cannot have for life, nor at will, nor for term of years, or of one year, and therefore the intire term passes. Per opinionem Cur. D. 307. b. pl. 69. Hill. 14 Jac. Anon.

Jo. 195. pl. 7. Chamberlain v. Tanner. S. C. adjudged that the whole

7. Testator made his will thus, viz. I devise the house or tenement where *J. N.* dwelleth, called the White Swan, to *H. G.* The whole house passeth, though *J. N.* dwelled but in three rooms of it; otherwise, if he had devised but the house in the occupation of *J. N.* and not named it by this particular name of the White Swan,

Swan, there perhaps it should not extend to more than was in the particular occupation of J. N. Cro. C. 129, 130. pl. 4. Mich. 4 Car. B. R. Chamberlain v. Turner.

house
passed.

8. It is said that there are cases, where *things only in contingency and possibility* may be devised; as if a man bequeath *corn that shall grow in such ground next year after his death, or the wool or lambs his flock of sheep shall yield the next year after his death*, but in case there shall be no such corn, wool, or lambs the next year, the legacy proves fruitless; yet * if the testator bequeaths 20 quarters of corn or 20 lambs, and doth will that the same shall be paid out of the corn that shall grow, or out of his flock the next year, and there be no such corn, or not so many lambs the next year, yet the devise is good and must be paid. Godolp. Orp. Leg. 419. 3d. Part. S. 15.

* Ibid. 419.
3d part S.
21.

(N. 2) Will.

Good, in respect of the Manner of making and executing thereof.

1. **I** F a man devises certain goods to his executors, or to one of his executors, to fulfil his will and dispose for his soul; this is a void legacy; for they ought to do it without such devise. But if they are devised to one of his executors to his own use, this is a good devise. Br. Devise, pl. 25. cites 21 E. 4. 6. If one devise all his term or goods to his executors for payment of his debts, it is a void bequest, because it is no more than what the law would say, if he had said nothing. So if it was generally to perform his will. Wentw. Off. Executor 253.—The words in the legacy are void and superfluous. D. 331. a. b. pl. 21. Hill. 16 Eliz.

2. One learned in the law took notes of the will of one sick, and after wrote the will, but before he shewed it to the sick, he died; and yet, by the opinion of the court, it is a good will in writing within 32 H. 8. to convey socage land. Dy. 72. a. pl. 2. Mich. 6 E. 6. Sackvil v. Brown.

3. The will of the deviser shall always be observed, if it be not impossible, or much against the law, and in other special cases; inasmuch as if a man seized of land devisable leases the same land unto a stranger for life, and afterwards by his will devises the reversion of the same land unto the stranger in fee, and dies, it is a good devise without attornment. The same law is of a rent devisable, &c. Perk. S. 562.

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4. A. went over sea and wrote such letter, that he willed that his lands should go in such manner; and adjudged a good devise. Per Popham in lectura cited Mo. 177. pl. 314. Mich. 24 Eliz. in West's case.

5. A man made his will thus, I will and bequeath my land to A. but the name of the deviser is not in all the will; yet this was held per tot. cur. that by averment of the name of deviser and

proof that it was his will the devise was good. 4 Leo. 104. pl.

211. Pasch. 29 Eliz. B. R. Anon.

Le. 113. pl.
155. S. C.
adjudged
accordingly

6. D. *devised his lands by parol*; W. N. a stranger, *being present, recited the words to him, and asked if that was his will*; he affirmed *that it was*, then W. N. put it into writing for his own remembrance, *in the life-time of the testator, but without his appointment*, and for that reason it was held by the justices to be a void devise; but if it had been read to him, and he approved it, in such case it had been as good as if written by his appointment. Cro. E. 100. pl. 3. Trin. 30 Eliz. B. R. Nash v. Edwards.

7. A devise may be *to the use of another*; agreed. Le 254. pl. 362. Trin. 33 Eliz. in the court of wards. Ellis Hartop's case.

Goldsb.
126. pl. 16.
B. C. but
not S. P.

8. The testator gave *instructions to another to write his will, and to give his lands to one of his sons for life*, but the writer put it down *in fee*; adjudged this was void, because it was not in the will of the testator. Mo. 356. pl. 483. Trin. 36 Eliz. B. R. Downhall v. Catesby.

9. Devise of *two acres of land out of four lying together* is good, and devisee shall have election. D. 280. b. 17. Marg. cites 40 Eliz. Grace Marshall's case.

10. A man ought to make a will by his *own directions* and not by *questions*; per Montague Ch. J. and not denied by any of the Justices. Cro. J. 497. pl. 3. Mich. 16 Jac. in B. R. in evidence to a jury in case of Cranwell v. Sanders.

11. An *actual devise by word* is no sufficient ground for a stranger to write the will, but there *ought to be an actual will, and desire that it should be written, and a bare wishing is not sufficient*, but there ought to be an actual willing; agreed, per cur. All. 54. Pasch. 24 Car. B. R. Lawrence v. Kete.

12. *And that this desire ought to be in some short time after the devise, so that it was one continued act*; for if the devise be at one time, and at another time the devisor sends for one to write his will, a new declaration will be necessary to make it effectual; agreed per cur. on evidence. All. 54. Pasch. 24 Car. B. R. Lawrence v. Kete.

13. An *actual desire of the husband, that such a certain person were there to write his will, was a sufficient ground for the wife to send for him*, though the devisor gave no express directions to do it; per cur. Agreed. All. 54. Pasch. 24 Car. B. R. Lawrence v. Kete.

14. The *writing of the will from the mouth of witnesses* was sufficient, and it need not be from the mouth of the testator; agreed per cur. All. 55. Pasch. 24 Car. B. R. Lawrence v. Kete.

15. Though the *devisor becomes senseless before the will is written*, yet if it be written before he dies, it is a good will in writing. Agreed per Cur. All. 55. Pasch. 24 Car. B. R. Lawrence v. Kete.

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16. Upon a trial at bar on this count in an issue out of chancery. 1st, It was resolved by the whole court, that if a man *draws up his own will and sends it to counsel to be advised of the legality of it*, this is no will unless it has a publication after he receives

elves it back from his counsel. 2dly, It was resolved, that *if after his will came from counsel with alterations made by counsel of the party puts his seal to it, or subscribes his name, or writes upon it, this is my will*, though there be no witnesses to it, yet this is a good publication, because any of those declare his intent that that should be his will. 3dly, It was resolved, that though it had no formal beginning, but *began, Also I give and bequeath*, and though there be *blanks in the will for the names of such persons as he said he had made a lease, or a feoffment to, to perform his will*, and if there be such lease or feoffment this is a good will, and shall direct those persons to whom such lease or feoffment is made, to perform all things according to the directions of such will. MS. Rep. (said to be copied from Ld. Ch. J Kelying's MS.) Trin. 15 Car. 2 B. R. Bartlett v. Ramdfden & al'.

17. One F. devised a sum of money to M. to dispose as testator *shall by a private note appoint*, who dies without such appointment, this is a good bequest to M. for the testator did not intend it should come to his executors, but by his will gave it away from them. 1 Chan. cases 198. Pasch. 23 Car. 2. Martin v. Douch.

as he had by writing under his hand appointed, but no such writing being to be found, the king appointed the charity, and the same was decreed accordingly. Vern. R. 224. Attorney General v. Siderfin.

S. by will charged a manor with 1000l. to be applied to such charitable uses

18. A will ought to be *ambulatory*, and to be made freely and voluntarily, and not to be gained *by restraint* and force upon the party, and Ld. Jefferies said he did not see how it can be esteemed a will otherwise. 2 Vern. 77. Trin. 1688. per Cur. in case of Nelson v. Oldfield.

19. A man may make his will *in several writings and at several times*, and if a will is written in three several sheets of paper not tacked together and subscribed by three witnesses severally, viz. one name to each sheet, this is a good will within the statute; Arg. to which Dolben J. agreed. Carth. 37. Trin. 1 W. & M. in B. R.

(N. 3) Will.

Good. Though Rased, Obliterated, or Torn, &c.

1. **I** F a will continues in writing at testator's death, though it be *lost or burned afterwards* it stands good, but if at the time of his death then the devise is void; agreed per cur. Allen. 55. Pasch. 24 Car. B. R. Lawrence v. Kete.

2. A man made his will and left it in a scrivener's hands for four years, and after the testator's death it was found *gnawn to pieces by rats*. By this will land was devised to A. in tail, and the scrivener with the help of the pieces, and of his memory and other witnesses, caused it to be proved in the ecclesiastical court. It was agreed, that if the clause of the devise to A. could be made out, though by *joining of the pieces* it would be a good will.

But

But the witnesses said, that a stranger that knew not the contents of the will before could not make out that clause; on which the court directed the jury, that if they found that the will was *known before the devisor's death*, then it was for the plaintiff; if after, for the defendant; and jury found for the defendant in favour of the will. Allen. 2. Mich. 22 Car. B. R. Etheringham v. Etheringham.

3. *Will of lands was snatched out of the executor's hands and torn to pieces* by a younger brother of the heir at law, but most of the pieces, especially such as concerned the devise of the land were picked up, and stitched together again. On a bill for establishing the will it was decreed that the devisees should hold and enjoy against the heir, and the heir to convey to them, though no proof that the heir directed the tearing. 2 Vern. 441. pl. 405. Mich. 1702. Haines v. Haines.

4. A. by will in writing duly attested by three witnesses devised to his wife a *copyhold estate* in E. — A. on the day he died directed B. to obliterate some devises, but nothing as to the copyhold, and then caused a memorandum to be wrote, that he had examined and approved of the will as so obliterated and altered in his presence by B. but did not republish it in presence of three witnesses, but directed B. to carry it to one to write it fair, and before it was brought back he became delirious. Held to be a good will and the trustees decreed to surrender accordingly. 2 Vern. R. 498. pl. 449. Palch. 1705. Burkit v. Burkitt.

(N. 4) Will.

Good in Part and void in Part.

1. **A** Will of land and personal estate not duly attested in the presence of testator, though not good as to the lands, is yet good as to the personal estate; as if a man makes his will and gives his land and 1000l. to J. S. and has four witnesses but does not subscribe his name in their presence; this is a good will for the money, but for the land it is void, though it is in the very same paper; per serjeant Maynard Arg. Show. 545 Mich. 4 Jac. 2. B. R.

9 Mod. 124.
Mich. 11
Geo. in
Canc. S. C.
and decreed
accordingly.
—2 Wms's
Rep. 296.
S. C.

2. A. seised of an estate for a term of years, and of a reversion of the same in fee mortgages the term and afterwards conveys the inheritance to C. which C. conveys to the mortgagee. Mortgagee now having the term and the inheritance both in him devises this estate by will, all of his hand-writing, but not published in the presence of any witnesses, to D. for life, remainder to E. in tail, disinheriting thereby the heir at law, and adjudged a void devise. For though it may be good notwithstanding the statute of frauds and perjuries to pass a term at law, yet as this term is connected with the inheritance and would have descended with that to the heir at law, in case there had been no will, the will being void as

to the inheritance shall be void likewise as to the term, and shall not sever the one from the other. G. Equ. R. 168. Pasch. 8 Geo. 1. in Canc. Whitchurch v. Whitchurch.

(N. 5) Will.

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Good. Though no Executors named.

1. **N**OTE by the doctors of the civil law and serjeants of the common law, that if a man *makes his testament and names no executors*, this is *no testament* but yet it is *his will of land* in it; for these are not testamentary, but in the first case, *where executors are wanting, yet the legacies shall be paid*. Br. Testament pl. 20. cites 37 H. 8.

2. *But if it appears that he made part of the testament and not the whole, there the legacies shall not be paid*. Ibid.

3. Will of chattles and *no executors named*, or if *all the executors refuse* is no will at all; but will of *land* devisable by custom, or by the statute is good, though no executor be named, for land is not testamentary by the course of the common law. Finch. 45. b. Yet in the case of want of executors as above, *legacies shall be paid*, and the will annexed to letters of administration. Finch. 46. b.

Godolph.
Orp. Leg.
12. Cap.
4 S. 3.
S. P.

4. Note, it was said by Richardson, that if a man says in his sickness, *I give 20 l. unto J. S. but does not make any executor*, yet J. S. shall recover against him that has the goods. But Crook J. cited 3 H. 4. that a devise is void if a *legacy* be given and *no executors* made. Het. 118 Mich. 4 Car. C. B. in Barley's case.

5. The testator made his will but *named no executors*, yet the court declared the will to be good. 2 Chan. Rep. 112. 27 Car. 2. Wirall v. Hall.

Such will
is void.
Noy 12.
Chadron

v. Harris; but if the ordinary grants administration with the will annexed, any legatee, by such will, may sue the administrator for the legacies in the spiritual court.

6. Testator gives all his personal estate to his *executor*, but leaves a blank, and *dies without naming any executor*, this devise is void. 2 Chan. Cases, 51, 52. Pasch. 33 Car. 2. Winne v. Littleton.

(N. 6) Will. Good.

Made beyond Sea, or in a Foreign Language.
Construed How.

1. **A** Stranger of the Low Countries being made a denizen in England, returned into his country, and dwelling there became sick, and in making of his will he *was advised* by counsel, *that by devise of all his goods, his lands devisable would pass*, and therefore

A will was
made in
Dutch, and
that was in-
sisted that

the testator's intent was to pass a fee to the daughter, but the will being in Dutch, they had not there the word (heir) in use among them;

but that a devise to children and their children passed a fee; but it was answered, that as to the Dutch never using the word heir, it signifies nothing; for a will that concerns land in England,* must be so framed as by the law of England is required for the passing of estates, as has been several times resolved in case of Latin wills, and the like. Vern. 84, 85. in pl. 74. Mich. 1682. and *ibid.* 147. Arg. S. P. in case of Bovey v. Smith.

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See Show. Parl. Cases 194. Foubert v. Cresseren.

therefore by such words he declared his will with the intention *afore-said*, (*scil.*) to pass his lands, and died, and afterwards the states of the Low Countries wrote unto King Hen. 1. acquainting him with the intention of the deviser, and also of the opinion of their laws there upon the said will, and all in favour of the devisee; whereupon the king referred the consideration of the matter to Norwich, then Ld. Ch. J. who declared his opinion to the king to be, that by that devise the lands did not pass, notwithstanding the intent of the deviser. 2 Leon. 165. pl. 198. Pasch. 26 Eliz. Wray Ch. J. cited 25 H. Anon.

2. A will was made in French, and the original proved in French, and underneath in the same probate the will was *falsely translated into English*. It was objected, that the translation must bind being part of the probate, and allowed in the spiritual court, and that the application must be thither to correct the mistakes, which till then must be conclusive. But the Master of the Rolls held, that nothing but the original is part of the probate, and the *spiritual court has no power to make a translation*, and this court, in case of a mistranslation, may determine according to what the translation ought to be, and so it did in this case. Wms's Rep. 526. Hill. 1718. *Le-Fit v. Le-Batt.*

(N. 7) Will.

What is good Signing and Attestation.

1. BEFORE the statute 29 Car. 2. a will was written by a lawyer, and published by the testator, but not signed by him being all in loose sheets; and this was adjudged a good will. Sid. 315. pl. 33. Mich. 18 Car. 2. B. R. Stephens v. Gerrard.

2 Keb. 345. pl. 23. Dine v. Monday. and S. C. all the judges would have had it found specially, but the counsel would not; and verdict generally for the plaintiff.

2. Twentieth day of June 1663. *Memorandum*, that Mr. S. B. did express and declare, that his brother J. B. and his heirs should be heir to the land. This was wrote by a doctor of physick, the testator being in bed and very sick, but published by the testator putting his seal to it after it was read to him but did not subscribe his name. The court allowed this to be a good will in writing to convey lands. Sid. 362. pl. 7. Pasch. 22 Car. 2. B. R. Dime v. Munday, alias Bate's case.

Jefferies Ch. J. seemed to hold that a will wrote all by the testator's own hand, and declared in the presence of three credible witnesses, would be within the intention of that

3. 29 Car. 2. cap. 3. s. 5. All devises of lands or tenements devisable, shall be in writing, and signed by the party devising or some other in his presence, and by his direction; and subscribed in his presence by three or four credible witnesses, or else shall be void.

would be within the intention of that

act, though *not signed* by him according to the words of the act *in the presence* of three credible witnesses. Skin. 127. pl. 5. Hill. 36 and 37 Car. 2. B. R. Anon. — 3 Lev. 1. Lemayne v. Stanley. S. P. adjudged Pasch. 33 Car. 2. C. B. per tot. Cur. And by North Ch. J. Windham and Charleton, dubitante Levins, the putting the seal to it had been a sufficient signing within the statute. — Freem. Rep. 538. pl. 727. S. C. the court inclined strongly that it was well enough, for though the act saith (signed) it is no matter where it is signed, whether at the top or the side, or the bottom; and it is not necessary to write his name, for some cannot write, and there their mark is a sufficient signing; and others have their name on a stamp, and that is good enough; and here it is found that the party writ it all with his own hand, so there can be no intention of fraud. And Levinz said, if another had writ the will, yet this sealing of it had been a good signing, but writing it with his own hand, it is clear. — A legacy was charged upon lands, but the witnesses to the will only proved that the testator sealed and executed the will in their presence, though the will appeared to be signed with the name of the testator. Cowper C. directed an issue to try if the will was duly executed according to the statute of frauds 29 Car. 2. Cap. 3. per Cowper C. MS. Rep. Mich. 3 Geo. in Canc. Freeman v. Freeman.

4. Two witnesses swore that J. S. the testator did not publish it as his will, but that A. B. guided J. S.'s hand, and J. S. made his mark but said nothing, nor was he capable. On the other side it was proved, how that J. S. had made two former wills, and in them [123] had divided his land in the like manner as by this will, and that he died of a consumption, and was sensible to the last; and how that three days after making his last will, he was sensible and able to discourse, and so continued till within six days of his death, hereupon it was plain to the court, that the witnesses had been dealt with; to which the counsel of the other side urged, that if the witnesses were not to be believed, then there would not be three witnesses to the will; and so no will within the statute of frauds and perjuries. To which Pemberton Ch. J. answered, that if there were three witnesses to a will, *whereof one was to his own knowledge a thief or person not credible*, yet the words of the statute being satisfied, and he having collateral proof to fortify the will, he would direct a jury to find it a good will; and as to this case, he said that it was not probable that a person in his senses (as they here are not able to disprove him to be) would suffer another to guide his hand to a writing and not say any thing, and that therefore they took it he did publish it. Skinn. 79. pl. 20. Mich. 34 Car. 2. B. R. Hudson's case.

5. And remembered Digg's Case in C. B. where the scrivener wrote the will and two others were witnesses, the scrivener swore the testator was compos, and the two other swore he was not compos; the court stopped these two till verdict was brought in, which found the will a good will, and then committed the two witnesses to the Fleet, for that if this was suffered, it would be in any man's power to destroy another's will; so likewise did the court of B. R. here commit the witnesses, and took security of the plaintiff to prosecute them for perjury. Skinn. 79. in S. C.

6. The testator lying sick in bed makes his will, signs, seals, and publishes it in the presence of the witnesses, but being tired, orders them to go and subscribe their names in another room; they go into another room out of the sight and presence of the testator, and subscribe their names, and then return and own their names to the testator, and he looks upon the will and says, they have done well; and if this shall be a good devise within the statute of frauds and perjuries is

is the point. [But nothing was spoke to this point.] Skin. 107. pl. 5. Pasch. 35 Car. 2. B. R. Risley and Temple.

But in all cases if the will being in several pieces of paper the witnesses must see all the pieces of paper, else it is not good; per Cur. 3 Mod. 263. Mich. 1 W. and M. 2 B. R. Lea v. Libb.

7. If a will is written in *three several sheets of paper not tacked together*, and those loose sheets are *wrapt up in a clean sheet*, and the *witnesses subscribe their names to that clean sheet*, this is a good attesting the will; Arg. and it seems agreed by Dolben J. Carth. 37. Trin. 1 W. & M. in B. R.

Show. 88. S. C. and judgment according to the opinion of Holt.

8. Per Dolben J. the *signing* a will is not necessary to be in the presence of the witnesses, but their *subscription* must be in testator's presence. But by Holt Ch. J. the *testimony of the witnesses is to be to all that the statute has made necessary*, and the signing of the party is one thing necessary, and the *sealing is a signing*. Show. 69. Mich. 1 W. and M. in case of Lea v. Lib.

Jefferies Ch. J. said it had been ruled good Skin. 227. Pl. 5.

9. A will of lands was *made before the statute of frauds*, and witnessed by two only. The *testator died after* the statute without altering his will. The Master of the Rolls thought it a good will to pass the land. But the other side insisting to have it tried at law, he directed it accordingly. Ch. Prec. 77. Trin. 1697. Serjeant v. Puntis.

10. A man devised a *legacy out of his land* and died; and in this case a *probate of a will* was given in evidence, it being of *15 years standing and the witnesses being three and dead*; *positive proof* was made of the death of two of them, and *circumstantial proof* of that of the third. 12 Mod. 342, 343. Mich. 11 W. 3. Coram Holt Ch. J. at Nisi Prius. Anon.

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G. Equ. R. 263. cites the case of Lea v. Libbe, as reported by Serjeant Broderick, and that Dolben J. held the owning his hand was a signing, and no new writing necessary; but Holt Ch. J. doubted of it. 2 Vern. 429. pl. 391. S. C. but S. P. does not appear.

11. Publication of a will before three witnesses, though *at three several times*, is good within the statute; per Ld. Wright, and thought the testator's *writing the will himself* a sufficient signing within the statute, though *not subscribed nor sealed* by him, but doubted whether *owning the subscription* to be his was sufficient; but he said, the validity of the will is a question at law, and therefore ordered it to be tried. Ch. Prec. 185. pl. 152. Hill. 1701. Cook v. Parsons.

10 Mod. 103. Ongley v. Pead. in B. R. Mich. 11 Ann. is on a different point. — 2 Ld. Raym. Rep. 1312. Ongley v. Pead. Mich. 10 Ann. is on a different point.

12. Oliver Earl of Bolinbrooke *before the statute 29 Car. 2. viz. 1668-9 wrote his will with his own hand* on a sheet of paper, and the writing went to the bottom of one side and half-way on the backside, which will at the end of it had the name and seal of the earl subscribed, and notice was taken in his own hand of some interlineations. At a very little distance at the backside of the same paper, a codicil was written, which extended almost to the bottom of the same backside of the paper, and was dated 1679, which was after the statute 29 Car. 2. and had the name of the deviser subscribed and his seal affixed; in which codicil a legacy, as to a house in Ludgate-street, &c. was revoked, and the same was thereby devised to Sir And. St. John for life, and after to his brothers successively, but notice

notice was not taken of the names of his brothers in the codicil, but they were named in the will; *at the top of the will was written (signed, sealed and published as my last will and testament in the presence of) the same being written here for want of room below; this was likewise written by the testator's own hand, and then the names of the three witnesses were subscribed; two of those witnesses were dead, and the third was produced at the trial, who testified that he was servant to the testator Oliver Earl of Bolingbroke four years, and about 27 or 28 years ago, he and the other two witnesses were called up in the night and sent for into the earl's chamber, who produced a paper folded up, and desired him and the others to set their hands as witnesses to it, which they all three did in his presence but they did not see any of the writing, nor did the earl tell them it was his will, or say what it was, but he believes this to be the paper, because his name is there, and the names of the other witnesses, and he never witnessed any other deed or paper for the earl. And though the earl did not set his name or seal to the will in their presence, yet he had often seen the earl write, and believes the whole will and codicil to be of his hand-writing. It was insisted, that upon this evidence it is apparent that the codicil was wrote before the execution of the will, for otherwise there was no reason that witnesses should write their names at the top of the first side of the will, and the words wrote by the testator's own hand, as the reason of it, had been false if the codicil had not been upon that paper, for there would have been sufficient room below the will for the witnesses to attest it. The witness also says, that the execution was about 27 or 28 years ago, which time is subsequent to the codicil. The execution is sufficient within the statute, for there is no necessity that the witnesses see the testator write his name, and if he writes these words, signed, sealed and published as his will, and prays the witnesses to subscribe their names to that, it will be a sufficient publication of his will, though the witnesses do not hear him declare it to be his will. And Sir John Hollis mentioned a case determined by Lord Chancellor Shaftsbury before the 29 Car. 2. where a man wrote his will with his own hand, and also these words, (signed, sealed, and published in the presence of) and no witnesses had subscribed it, it was held to be a sufficient publication; and Trevor Ch. J. inclined, that here was sufficient evidence to find the codicil well executed, and the jury found it accordingly. Comyns's Rep. 197. pl. 119. Hill. 8 Ann. C. B. Peate v. Ougley.*

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13. A testator signs his will, but delivers it as his act and deed, yet well, for this will be sufficient publication. Hill. 10 Geo. Canc.

14. A will charging land by virtue of a power so to do by his last will, or any writing purporting to be his last will, under his hand and seal attested by three or more credible witnesses, was not signed by the testator in the presence of three witnesses, but he acknowledged it to be his hand, and declared it to be his will in the presence of three witnesses and they subscribed their names in his presence. Ld. Chancellor King said, that though he himself inclined to think the will of the land good, if the testator should acknowledge the name

S. P. and the will held good, though all the witnesses did not see the testator sign, but he owned it before
to

them to
be his
hand. 3
Wms's
Rep. 254.
Falc'h. 1734.
Stonehouse
v. Evelyn.
— And
Did the
reporter
say, that
on his men-
tioning the
Master of the Rolls opinion as above to Mr. Justice Fortescue Aland, he said it was the common
practice, and that he had twice or thrice ruled it so upon evidence on the circuit; and that it is
sufficient, if one of the three subscribing witnesses swears the testator acknowledged the signing
to be his own hand writing. And it is remarkable, that the statute of frauds does not say the testator
shall sign his will in the presence of three witnesses, but requires these three things; 1st, That
the will should be in writing; 2dly, That it should be signed by the testator; and 3dly, That it
should be subscribed by three witnesses in the presence of the testator.

to be his, and the witnesses should subscribe in the presence of the testator, yet that point should be reserved to the defendant. And said, that he took this will to be a good one, and being so, to be a good charge, but referred it to the judges of B. R. to be made a case on this and another point, but as to this point of the testator's not signing in the presence of the witnesses, the case to be made upon the depositions and referring to them, and it was determined by the judges of B. R. on argument that the will was void as a charge, for want of being sealed. 2 Wms's Rep. 506. pl. 163. Hill. 1728. Dormer & al' v. Thurland and al'.

15. Upon an issue directed out of chancery, wherein the question was, whether a man was compos or not at the time of executing his will, it was held by the Ch. J. that it was not *necessary that all the witnesses to the will should see it executed, if one of them saw it executed, and the others were present*, he said, it would be sufficient. Barnard. Rep. in B. R. 367. Trin. 3 Geo. Durrant v. Durrant.

16. In ejectment brought by the plaintiff, as heir at law. The question was on a case by consent and left to the opinion of the court, whether it shall be *left to a jury to determine, whether the witnesses to a will (being all dead) set their names in the presence of the testator, and this merely upon circumstances, without any positive proof*. Per Cur. This is a matter fit to be left to the jury which is all referred to the court. The witnesses by statute of frauds ought to set their names as witnesses in presence of the testatrix, but it is not required by the statute that this should be taken notice of in the subscription to the will; and whether inserted or not, it must be proved; if inserted, it does not conclude but it may be proved contra, and the verdict may find contra; then if *not conclusive when inserted*, the omission does not conclude it was not so, and therefore *must be proved by the best proof the nature of the thing will admit of*.

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In case the witnesses be dead, there cannot probably be any express proof, since at the execution of wills few are present but deviser and witnesses; then as in other cases the proof must be circumstantial, and here are circumstances; 1st, Three witnesses have set their names, and it must be intended they did it regularly. 2dly, One witness was an attorney of good character, and may be presumed to understand what ought to be done, rather than the contrary. And there may be circumstances to induce a jury to believe that the witnesses set their hands in presence of the testatrix rather than the contrary, and it being a matter of fact, was proper to be left to them; as, whether livery was given on a feoffment, when no livery is indorsed; whether a deed was executed when only a counterpart was produced, &c. And the court was of opinion the plaintiff

plaintiff ought to be nonsuited. Comyns's Rep. 531, 532, 533. pl. 218. Palch. 9 Geo. 2. C. B. Hands v. James.

17. Will shall not be read on proof of witness's hand unless there be positive proof that he is dead. Comyns's Rep. 614. pl. 265. Hill. 11 Geo. 2. in Scacc. Bishop v. Burton.

(N. 8) Will. Signing and Attestation. Necessary in what Cases.

1. **THREE** testamentary schedules, whereof one was without date, the second was wrote (In witness) but no witness, the third concluded abruptly, yet being wrote by R. H. the testator, they were declared to be his will. Comyns's Rep. 452. cites March, 1710. Wright v. Walthoe.

2. M. P. sent for a person to make her will, gave him instructions to do so, when he had wrote it he read it to her, she approved it, declared it to be her last will, sent for three witnesses to see her execute it, signed and sealed was written, but she died before any other execution, yet it was held a good will, for though the first sentence for it was reversed upon an appeal, yet it was afterwards affirmed before the delegates. Comyns's Rep. 452. cites anno 1711. Worlick v. Pollet.

3. If a will be made of goods and written in the parties own hand without any witness at all, it is allowed to be good, and the statute does not require any witnesses to chattles only. Per Gilbert Ch. B. Gilb. Equ. R. 260. in cases in the Exchequer in Ireland, tempore Geo. 1.

4. A will of a real and personal estate was prepared in order to be executed, though several blanks in it, and the testator died before execution; yet it was held a good will for the personal estate. Comyns's Rep. 453. Arg. cites 1721. BROWN v. HEATH AND POCKLINGTON. And says that though more was intended to be done, yet it shall be good for what is done, as in Butler and Baker's case, 3 Rep. If a will be part writ in the testator's life, though more was intended to be written, it shall be good as far as it was writ.

5. L. intending to make his will, pulled a paper out of his pocket, wrote down some things with ink, some with a pencil, and though it had no conclusion, but appeared to be a draught which he intended after to finish, for it was not signed, but had at the end a calculation of his effects, an account of his tea-table, and an order to *pay Sir ——— Hankey a dividend of stocks, yet it was held a will. Comyns's Rep. 452. cites 1730. Loveday v. Claridge.

So in a case where the testator gave instructions to make his will of his real and personal estate, and when it

was brought to him he made several alterations, and then wrote the whole over as altered with his own hand; this found in his study, though not signed or sealed, was held a good will, it was true the first sentence was, that he died intestate; but that was reversed by the delegates 18 July 1704. Comyns's Rep. 453.

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Ibid. cites 2 Vern. 597. Attorney General v. Baies. And Ld. Chancellor said, 6. If a copyholder after admittance surrenders the lands to the use of his last will, and by his last will gives them to J. S. but the will is not attested by any witness, yet J. S. is well intitled to the lands; per Ld. Chancellor. Barnard. Chan. Rep. 11, 12. Pasch. 1740. Tuffnell v. Page.

that the reason is that the party is in by the surrender, and not by the will, and therefore it is good, though there be no witness at all; but that it is necessary that the will be in writing, and if it be so, it is sufficient if it be signed by the party. — And so it is where a person is intitled to the trust of a copyhold, though there was no surrender at all to the use of the will, nor the will attested by any witness, yet it is sufficient to give the trust of the copyhold estate; per Ld. Chancellor, and said, that this is merely the case of a trust, and the testator could not make a surrender of it. Ibid. 11, 12, 13.

(N. 9) Will. Attestation.

Subscribing in Testator's Presence what is.

Carth. 81. cites S. C. that the testator being sick in bed, made his will, which he signed in the presence of three witnesses, but he being very ill, the witnesses withdrew into a gallery, and there subscribed it, between which gallery and the bed-chamber where the testator lay, there was a lobby with glass-doors, and the glass broken in some places; and it was proved that the testator might see from his bed where he lay (through the lobby and the broken glass-windows) the table in the gallery where the witnesses subscribed their names; and this was adjudged a good will to pass lands within the intent of the statute, for it shall be deemed to be subscribed in his presence, as far as a man may see in an house. — 12 Mod. 37. S. P. and 3 Salk. 395. Davy v. Smith S. P. — Cumb. 158. Ecclestone v. Speke. S. P.

1. THE witnesses at the desire of the testator went into another room seven yards distant to attest the will in which there was a window broken through which the testator might see them; Per Cur. the statute required attesting in his presence to prevent obtruding another will in the place of the true one. It is enough if the testator might see, it is not necessary that he should actually see them signing, for at that rate if a man should but turn his back or look off, it would vitiate the will. Here the signing was in the view of the testator; he might have seen it, and that is enough. So if the testator being sick should be in bed and the curtain drawn, 2 Salk. 688. Pasch. 3 Jac. 2. C. B. Shires v. Glascock.

2. One of the witnesses to a will of land swore that he subscribed the will as a witness in the same room, and at the request of the testator. Two others swore, that they subscribed the same in the presence of the testator. A fourth witness was gone beyond sea, and so not examined. Ld. C. Cowper doubted, but at present declared no opinion as to proof of the execution by that one witness. Afterwards Ld. Macclesfield upon the cause coming on before him held, that the bare subscribing by the witnesses in the same room did not necessarily imply it to be in the testator's presence; for that it might be in a corner there in a clandestine fraudulent way and so would not be a doing it in testator's presence; but that here it being sworn, that he subscribed at testator's request and in the same room, this could not be fraudulent and was therefore well enough. Wms's Rep. 740. Mich. 1721. Longford v. Eyre.

3. The proper way of examining a witness to prove a will of land is, that the witness should not only prove the executing the will by the testator and his own subscribing it in his presence, but likewise that the rest of the witnesses subscribed their names in testator's presence

presence and then one witness proves the full execution of the will. Per Ld. C. Macclesfield. Wms's Rep. 741. Mich. 1725. in case of Longford v. Eyre.

4. Upon a trial at bar concerning the execution of a will, it did not appear upon the face of it, that the attestation of the witnesses was made in the presence of the testator, which being objected to, a case was cited where Ld. Ch. J. Eyre held it a matter proper to be left to a jury, whether they believed it to be so done or not; and Mr. Justice Chappel cited a case to the same purpose, quod curia concessit, and held it is not necessary it should be inserted in the will, that the attestation was in the presence of the testator, though by the statute it is necessary that it should in fact be so attested. Pasch. 12 Geo. 2. B. R. Croft on demise of Dalby v. Pawlet.

(N. 10) Will. Attestation Good.

Subscribing at several Times.

1. A will made in writing, and one of the three witnesses who saw it published, set his hand to it at another time, and held good. And so it had been adjudged, as Sir Francis Winnington told the reporter. Freem. Rep. 486. pl. (664. c.) Mich. 1680. Anon.

2. A will of lands attested by three witnesses, who at several times subscribed their names at the request of the testator, but were not present at once together, was decreed good within the statute of frauds. 2 Chan. Cases 109. Trin. 34 Car. 2. Anon.

1 W. & M. in B. R. ——— S. P. by Dolben J. Comb. 175. ——— Per Dolben J. it is a good will to pass the lands. But Holt Ch. J. e contra. Carth. 36. S. C.

3. A will for land duly signed by testatrix in the presence of A. and also published, which A. writ the will, but is now dead; his hand was proved; after this the testatrix called in B. to be a witness to the will; she told him it was her will, and published it as such; after this she called in C. and did the same. The question was, whether these witnesses attesting this will at several times, though all in the presence of the testatrix was according to the statute of frauds and perjuries; Baron Price held it ill, for the intent was, that all the witnesses should be together, that one might testify for the other, and this was a ready way to let in fraud and perjury, for after the first witness had attested it there might be a rasure or interlineation in it. Lent assizes at Devon 1717.

S. P. by the
attorney
general.
Arg. 3
Mod. 262,
263. Mich.
1683.

(N. II) Will. Attestation Good.

By what Number. By three or less, though touching Land.

1. **MORTGAGOR** devises the *equity of redemption*, the estate being forfeited by non-payment. But whether this is to be considered as land, so that three witnesses were requisite, non constat, though it was the point in dispute. 2 Ch. Cases 8. Mich. 31 Car. 2. Anon.

2. By the canon law, and so by our law *two witnesses are requisite to prove a will for goods and three for lands*. 3 Salk. 396. pl. 1. Anon.

2 Verh. 597. pl. 526.
Mich. 1707.
S. C. decreed accordingly.
— 3 Chan. Rep. 150.
S. C. Ld. Chancellor held accordingly; but it being (as he said)

3. A. surrenders *copyhold* land to the use of his will, and then makes his will in writing, and devises his freehold and copyhold to *charitable uses*. The will was all written with his own hand, but had *no witnesses* to it. A. made a *codicil* reciting the will, and this had *four witnesses* to it. It was urged and not denied that doubtless the copyhold was well devised, for that passed by the surrender and not by the will. But Ld. Cowper decreed the will was not good to pass the freehold, and not being good as a will, it could not operate as an appointment. Ch. Prec. 270. pl. 221. Mich. 1708. Attorney General for Sidney college v. Bains.

a favourable case on the one side, and a charity on the other, he would consider farther of it, and would confer with the judges to it. — S. C. cited by Ld. Chancellor, Barnard. Chan. Rep. 22. Pasch. 1740. and said that in case of the copyhold the will is good, though it be not attested by any witnesses at all. So far indeed it is necessary that the will in such case must be in writing; but when it is in writing, and signed by the party, that is sufficient for such purpose.

Sel. cases in chan. in Ld. King's time. 42. Trin. 12 Geo. 1. S. C. came before Ld. C. King, the surrender is said to be to trustees [but does not say (and their heirs)] and that the will was made with only two witnesses to it. It was admitted that a will of a copy-

4. A. seized in fee of *copyhold lands*, makes a *surrender to the use of B. and C. and their heirs to the use of his will*, and devises the lands to D. Quære, if devise of copyhold lands is good in this case without the circumstances required by the statute 29 Car. 2. of frauds in devises of lands be duly observed.

Parker C. of opinion that the circumstances required by the statute of frauds in devises of lands ought to be observed in this case, for by this surrender the fee of the copyhold was in the surrenderees, and only a trust devised by the will: which cannot pass by the devise without the circumstances required by the statute of frauds in relation to devises of land to be duly observed. But the counsel insisting that a devise of copyhold is not within the statute of frauds, Ld. Chancellor said, that if the surrender had been only to the use of the will, that might have been a question in this case, but now it is not; however, he inclined to think it necessary in that case but would not determine that point now, that not being the case before him. MS. Rep. Pasch. 7 Geo. Canc. Appleyard v. Wood.

hold estate does not require three witnesses; but this is a devise of a trust relating to lands, so within the very words of the statute of frauds; the heir controverting the surrender and the will, this point was not determined, but two issues ordered. Though the Chancellor seemed to be of opinion,

opinion, that the devise of a trust must ensue the nature of the estate, and not make it to be necessary to have three witnesses, as the copyhold might be devised without three witnesses; this may be a question to be determined when the issues are tried.

5. A. conveyed lands to trustees to the use of them and their heirs in trust, that after such monies raised as therein mentioned, the trustees should convey to J. S. his heirs and assigns, or to such as he or they should direct. The monies were raised, and J. S. by will attested only by two witnesses, devised the premises to J. N. Ld. C. Macclesfield said, that there could be no question but that the trust of an inheritance must be devised in the same manner as a legal estate, for if the law were otherwise, it would introduce the same inconveniences as to frauds and perjuries as were before the statute by a devise of a legal estate in fee simple, and so held the will void, and ordered the trustees to convey the premises to the testator's heir at law. 2 Wms's Rep. 258. Mich. 1724. Wagstaff v. Wagstaff.

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6. And Ld. Macclesfield held, that as the will did not refer to the deed of trust, and as J. S. had undertaken to devise the land as owner thereof, without any relation had to the pretended power, it made it much stronger against the will. 2 Wms's Rep. 260. Mich. 1724. Wagstaff v. Wagstaff.

7. A copyhold surrendered to the use of a will, and afterwards devised by a will attested by two witnesses, or one witness only, has been adjudged good. But Ld. Macclesfield said that the copyhold passes by the surrender and not by the will, and that if this matter had not been settled it would be more reasonable to say, when I have surrendered my copyhold to the use of my will, that a will of this my copyhold shall be so executed, and in such a manner as by the act of parliament a will of lands ought to be executed. 2 Wms's Rep. 258. Mich. 1724. in case of Wagstaff v. Wagstaff.

S. C. cited
Arg. 2-
Wms's
Rep. 510.
— S.P.
admitted,
and for the
same reason,
by the
Master of
the Rolls.
Hill. 1727.

to have been so settled, and that the will is only a declaration of the use of the surrender. But if a copyholder be seized only of the trust or equity of redemption of the copyhold, and devises such trust or equity of redemption, the will must have three witnesses; for in such case there can be no precedent surrender to the use of the will to pass this trust, and the comprising the trust of a copyhold within that statute is no prejudice to the Lord, because he who has the legal estate is tenant to the Lord, and must answer all services. 2 Wms's Rep. 261. Anon.

But at the bottom of the page is added a note *contra*, that the trust of a copyhold would pass by a will not attested according to the statute of frauds, as a copyhold surrendered by will would do; for that equity ought to follow the law, and make it at least as easy to convey a trust as a legal interest, and that the same was decreed accordingly by Ld. C. Hardwick. Pasch. 1740. Tuffnell v. Page.

8. Wills, though made beyond sea, of lands in England, must be attested by three witnesses. 2 Wms's Rep. 291, 292, 293. Trin. 1725. Coppin v. Coppin.

Sel. Chan.
cases in Ld.
King's time
S. C. but

though this point is in the state of the case there, yet it says nothing of the opinion of the court as to this matter.

(N. 12) Will. Attestation.

What shall be said to amount to an Attestation by Three.

Carth. 35. S. C. adjudged accordingly. — Comb. 174. Lee v. Libb. S. C. adjudged accordingly. — Show. 68. S. C. adjournatur — Ibid. 88. S. C. adjudged accordingly. — 3 Mod. 262. S. C. adjudged not a good will.

1. **THE** testator made his *will* in writing, *subscribed by two witnesses*, and *devised all his lands* to W. R. Afterwards he *made a codicil, in which his will was recited*; and this also was *attested by two witnesses, one of which witnesses was a witness to the will*, but the other was a new witness; the question was, whether this new witness should make a third to the will, the statute requiring that there should be three; and adjudged that he should not. It is true, here are three witnesses to the intent and will of the testator, but there are but two to his will in writing; it is true likewise, that there are two * witnesses to the codicil, but those are not witnesses to the written will, so that there *wants one witness to the will in writing*. 3 Salk. 395. pl. 2. 1 W. 3. B. R. Lea v. Libb.

*[131]

2. On the 11th of May 1708, the testator signed, sealed, published and declared his will in the presence of A. who signed as a witness in the testator's presence; afterwards on the 12th of May the testator signed, sealed, and published in the presence of B. and C. and other subscribing witnesses, who signed as witnesses in testator's presence. It seems admitted that this was a good will within the statute of 29 Car. 2. as to the devising of lands. See Gilb. Equ. Rep. 255, 256. tempore Geo. 1. in the Exchequer in Ireland, Lodge v. Jennings.

3. A surrender was made to a *feme covert* of copyhold lands, with a power reserved to her to surrender it to such uses as she by writing, or last will, in the presence of three witnesses should direct or appoint. She made a will in pursuance of her power executed in the presence of three witnesses, and gave it to her daughter and heir. Afterwards she made a surrender, together with her husband, to the use of her husband and his heirs; but this was made in the presence of two witnesses only, who subscribed their names (as witnesses); but the deputy-steward who took the surrender had set his name to it. On a bill by the husband after the wife's death to establish this surrender, who would have the steward to be considered as a third witness, the daughter, the defendant, pleaded a title by the will, and also demurred, for that the plaintiff's title, if any, was only at law, and he might bring ejectment. Lord Chancellor seemed to think the plea good, as a plea of the defendant's title, and the demurrer good likewise, as a demurrer to the plaintiff's title; but at last he over-ruled the plea, and allowed the demurrer. Abr. of Cases in Equ. 42. Trin. 1728. Cotter v. Layer.

(N. 13) Will. Attestation.

Good. In Respect of the Witnesses.

Persons Interested, and in London.

1. **W**ILL of land in London ought to be inrolled in the hustings, and ought to be proved by *citizens* and not by strangers. Per Southcote. Dal. 117. pl. 11. anno 16 Eliz. Anon.

2. Where there is a devise to the ministers and *churchwardens* of lands for maintenance of the *poor for ever*, any of the parishioners of the said parish may be witnesses to prove the will. 2 Sid. 139. Mich. 1658. Townsland v. Roe.

3. *Child of a residuary legatee* is no witness by the civil law to prove a will of a personal estate, by which law only such wills are determinable; and therefore, where a writing revoking such will was signed in the presence of three witnesses (as the statute of frauds requires) whereof one of the three was unexceptionable, but the other two were children of the residuary legatee; it was held upon appeal to the delegates, that the children were not to be allowed as witnesses. Wms's Rep. 10. Mich. Vac. 1696. Thwaites v. Smith.

Note the reporter adds a quære to this case, whether the will in question appeared to be written, or so much as subscribed

by the testator's own hand, since in either of those cases it would have been good without any witnesses at all. Ibid. 13. and cites Swinb. 300.

* Ld. Raym. Rep. 91. reports the case of Smith v. Thwaite. S. C. as cited by Powell junior, J. in C. B. Trin. 8 W. 3. as adjudged by the commissioners delegates (of whom the two Powells justices, and Sir Samuel Eyre, J. were three) that the two children cannot be admitted to be witnesses to prove this will, because their father and mother upon contingency (viz. if there shall be any remainder of the goods after the legacies before devised shall be paid) shall be legatees.

4. By Powel junior justice. If the *spiritual court refuse the evidence of the son to prove a will in which the father is a legatee*, no prohibition is grantable. And he cited this case as lately adjudged before commissioners delegates. There were *three witnesses to prove a nuncupative will*, two of them were without exception, and the third was son to the legatee; the statute of frauds requires three competent witnesses. The question therefore was, if these three were sufficient? the son not being an evidence by the spiritual law; and adjudged they were; because two only were required by the spiritual law, and the third was a *good witness within the intent of the act of frauds*. Ld. Raym. Rep. 85. Trin. 8. W. 3. Anon.

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5. It was resolved, Mich. 8 W. 3. B.R. upon evidence in a trial at bar, viz. That a *legatee* cannot be a witness to prove the will, because the legacy is devised to him, *unless he has released the legacy*. But after such release he will be a good witness to prove the will. But if the counsel of the other side have permitted such legatee to be sworn, and to be examined as a witness, *without having taken exception* against him, they cannot afterwards except against his evidence for the reason that he was a legatee. Ld. Raym. Rep. 730. Pyke v. Crouch:

12 Mod.
276. Hilli-
ard v Gen-
nings. S. C.
adjud-
ged.—

6. *A. devisee of lands in fee* was one of the three witnesses to the will, the will is void quoad the devise of the land to such witness, so that, with respect to that, the will was attested only by two witnesses. Carth. 514. Hill. 11 W. 3. B. R. Hilliard v. Jennings.

Freem. Rep. 509. Helier v. Jones S. C. and S. P. adjudged.—Ld. Raym. Rep. 505. Hilliard v. Jennings. S. C. the whole court were of opinion to give judgment for the defendant, viz. that the devisee was not a good witness; but upon the importunity of the plaintiff's counsel, to have another argument; adjournatur.—Comyns's Rep. 90. pl. 60. S. C. argued; and Ibid. 94, 95. pl. 64. S. C. the whole court held that the will was not well executed; for the plaintiff was not a credible witness, as he himself was to take by the will.—S. C. cited by Sir R. Raymond, that the will, as to this devise only was void, and that then *A.* would be a good witness as to the rest of the will. Nay that even with respect to the lands devised, if *A.* had aliened such lands without any covenant or warranty, or had not by taking the rents and profits been liable to an account, he would, according to the above-mentioned resolution, have been a good witness to the whole will. Wms's Rep. 557. Trin. 1719. in case of Baugh v. Holloway.

The case of BAUGH v. HOLLOWAY was that *A.* devised lands to *C.* and his heirs in trust to pay *B.* his debt at law of *A.* 200 l. *C.* was one of the witnesses to the will. *B.* brought a bill to impeach the will for want of three credible witnesses, *C.* being interested. Ld. C. Parker said nothing as to the point above urged by Sir R. Raymond, but that the heir ought to have contested the will at law, and if it had been adjudged against him there that the will was good, then he might have come here for the 200 l. and directed the bill to be retained for a year from Mich. term next, that *B.* might have two affizes to try the will, but that *B.* pay *U.* his costs. Wms's Rep. 557. Trin. 1719.

(N. 14) Will. Attestation.

Where the Devisor had Term and Fee in the same Land.

9 Mod. 124.
S. C. de-
creed that
the term
did not pass
by this de-
vise.—
Gilb. Equ.
Rep. 168.
S. C. with
the argu-
ment of
Ld. Ch. B.
Gilbert.

*[133]

1. *A.* Had a mortgage for 500 years of *B.* to commence from the making, and afterwards, for securing a further sum, took another security for 1000 years in the name of *J. S.* but in trust for himself, to commence also from the making, and afterwards purchased the * inheritance in his own name, and devised the premises to *J. W.* and made *R.* executor. The will was neither dated, subscribed, or attested, but was all of the testator's own hand-writing. *R.* proved the will, and assented to the devise. It was insisted that the will was good at law to pass the term of 500 years, it being a subsisting term, and not merged in the inheritance by reason of the intermediate term, which operated as a grant of the reversion, and not as of a future interest; and that the grant being for 1000 years to commence from the making, did pass the reversion for 1000 years, quod fuit concessum per cur. But the Master of the Rolls decreed, that as this was a term which would have attended the inheritance, and in equity have gone to the heir and not to the executor, and in that respect to be considered as part of the inheritance, and so this term did not pass by such will. 2 Wm's Rep. 236. Trin. 1724. Whitchurch v. Whitchurch.

(O.) What

(O.) What Act will [would] *revoke* it;
[before the Statute of 29 Car. 2. cap. 3.]

[1.] If a man *devises lands* by the statute of 32 H. 8. by writing, and after *revokes it by parol in presence of certain persons requiring their testimony of his present revocation; and says further, that he will alter it when he comes to D. and before he comes there he is murdered*, this will is revoked though it was not in writing. D. 13. L. 319. [b. pl.] 81. resolved, [Kite's case.]

Ibid. cites S. P. held accordingly the same term in the case of Brook v. Ward.

— If a man makes his will in writing, and says then that he will add to it, or alter it, it is not his will, because not complete nor published for his will. But if a man makes his will, and publisheth it, and after it comes in his mind to add to it or alter it, and says he will do so, but dieth before any addition or alteration of it, the first will shall stand. Resolved by the two Ch. Justices and Ch. Barons in the court of wards. Mo. 874. pl. 1222. Rider's case.

[2.] If a man *devises lands* to another, and after makes a *feoffment to the use of his will, this is a revocation of the will*. Hussy's case agreed. Cited per Will. Hill. 4 Jac. B. R. in Frecheville's case.]

Mo. 789. pl. 1096. 2 Jac. S. C. the devisor was a bastard, and

after making the will, he made a feoffment of the manor to the use of such persons, and for such estates as he had declared by his will, bearing date, &c. Adjudged that the feoffment was a countermand of the will, and yet the countermanded will was sufficient to declare the use of the feoffment, and so no deceit to the crown.

[3.] If a man *covenants by indenture to levy a fine*, and that this shall be *to the use of such persons as he shall nominate by his will*, and after he makes a will by which *he devises the lands to certain persons, and after he levies a fine in performance of the said covenant*, this is a revocation of the will, though it is levied in performance of a covenant which was made before the will, for the land cannot pass by relation to the time of the covenant made, but only to the time of the fine levied. Trin. 16 Jac. in curia Wardorum, between Lutwiche and Mitton, agreed per curiam and counsel.]

Jo 7. pl. 7. Mitton v. Lutwiche. S. C.

4. [If a man *devises lands to one and afterwards devises it to the poor of such a parish*, which is void, because they have not capacity to take, yet this is a revocation. 29 Eliz. French's case adjudged, cited Pasch. 41 Eliz. B. R. Montague's case.]

S. C. and P. cited 10 Mod. 94. Arg. Mich. 11 Ann. in case of Radcliffe v. Roper.

[5.] So, if he *devises it to a corporation*, because the devise to them is not within the statute, yet this is a revocation. Pasch 41 Eliz. B. R.]

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6. One made his will and *devised all his lands to A. H. and her heirs*, and after wards being sick and lying on his death-bed (because A. H. did not come and visit him) he affirmed that A. H. should not have any part of his lands or goods. Resolved, that this was not any revocation of the will, being but by way of discourse, and not mentioning his will; but the revocation ought to have been by express

expres words, that she should not have the lands given to her by the will, which might shew his intent to make an expres revocation, otherwise it is not good. Cro. J. 115. pl. 2. Pasch. 4 Jac. in *B. R. Simson v. Kirton*.

7. If one makes his will in writing of lands, and afterwards upon communication says, that *he has made his will but that shall not stand, or I will alter my will, &c.* these words are no revocation of his will, for they are only words in futuro, and a declaration what he intends to do. But if he says, *I do revoke it, and bear witness thereof*, it is a declaration of his purpose, in presenti, and it is then a revocation; and as a will ought to be by his own directions, and not by questions, so ought it to be of the revocation of it. Cro. J. 497. pl. 3. Mich. 16 Jac. *B. R. Cranvel. v. Sanders*.

8. One made his will and afterwards said, *I utterly renounce and detest that will, and will make a new one*, are good words of revocation. But if they were, *that will shall not stand, I will make a new one*, they are not; for the first words shew a present purpose of revocation. Het. 97. Pasch. 4 Car. C. B. *Allen v. Westly*.

Sty. 418.

Trin. 1654.

S. P. by

Roll Ch. J. on evidence in a trial at bar between Bridges and Ld. Chandos. — S. P. resolved Cro. E. 306. pl. 6. Mich. 35 and 36 Eliz. B. R. *Burton v. Gowell*; and cites *Dyer* 14 Eliz. *Harison's case*.

10. A man devised legacies to his two brothers, and afterwards in his sickness was asked to leave legacies to his said brothers, he replied, *he would leave them nothing*, but devised a small legacy to his godson, and died. This discourse was set down in a codicil, which, together with the will, was proved in common form; this codicil was not a revocation of the legacies given to the brothers, because the testator took no notice of the will which he had made in the time of his health, and non constat what he intended by these words which were set down in the codicil. 3 Mod. 206. Pasch. 4 Jac. 2. B. R. Arg. cites Cro. C. 51. [pl. 13. Mich. 2 Car. in *Canc.*] *Eyre's case*.

{ Fol. 615. }

(P) What Act shall be said a Revocation.

[A Thing not performed] Pl. 1, 2, 3. [Act done but otherwise void.] Pl. 4, 5, 6, 7.

*[135]

S. P. as that he will do it when he comes

[1.] If a man saith that he will at a future time revoke a will which he hath made, this is not any revocation before other act done. Mich. 38, 39 El. B. R. per curiam.]

home, and he dies before he comes to his house, this is not a revocation, but only an intent which never was executed. 2 Sid. 75. Pasch. 1658. B. R. per Cur. in case of *Marret v. Sly*. — J. S. devised land by * will made at P. and after lying sick at S. declared that his will made at P. shall not stand. Resolved that verba in futuro shall be taken futuramente when they refer to a future act; otherwise when they refer to a present resolution; but per Popham, if he had said, "I will revoke my will made at P." this is no present revocation; for it referred to a future act; but when he says, "It shall not stand," this takes effect presently; and adjudged a present revocation.

1000. Cro. E. 306. pl. 6. Mich. 35 and 36 Eliz. B. R. Burton v. Gowell. — Cro. J. 597. pl. 3. Mich. 16 Jac. B. R. Cranvel v. Saunders it was resolved per cur. upon evidences that the words, "I have made my will, but that shall not stand;" or "I will alter my will," &c. are not any revocation; for they are words in futuro, and a declaration of what he intends to do.

[2. So if he says he will make a feoffment thereof to another, this is not any revocation before it is done. Mich. 38, 39 El. B. R. per Popham.]

[3. If a man seised in fee of a reversion of land, devises it by will in writing to J. S. his brother, and after covenants with B. upon a marriage with the sister of B. to make a feoffment in fee of the said lands, and of other lands also, which feoffment shall be to the use of himself for life, the remainder to the said sister of B. for life for her jointure; such covenant without more is not any revocation of the will; for perhaps his intent will alter before the performance thereof. Mich. 38, 39 El. B. R. between Montague and Jeffry, agreed per Curiam.]

[4. But if after the said covenant made he makes a deed of feoffment accordingly, with a letter of attorney to J. N. to make livery, and the attorney makes livery in the other land in the name of the whole, the lessee for life of the land devised being then in possession thereof, who never attorned to this feoffment, by which the livery as to the land devised is merely void, yet this is a revocation of the will, for here the intent of the deviser is fully expressed to have it revoked, inasmuch as he hath appointed another to execute it for him. Dubitatur, Mich. 38, 39 El. B. R. between Mountague and Jeffrys, Pasch. 41 El. B. R. the same case.]

—Show. Rep. 544. S. C. [as it seems] cited Arg. by serjeant Maynard. Mich. 4 Jac. that the feoffment is void but the revocation is good. —S. C. cited 2 Salk. 592. in pl. 1. that though it be a void act, yet it will revoke a will. —Wentw. Off. of Executors 22. S. P.

[5. If a man seised of a reversion expectant upon an estate for life devises it to J. S. and after by his deed grants the reversion in fee to J. D. Though the lessee never attorns, yet this is a revocation, inasmuch as he hath fully shewed his intent that the other should have it, and put it in the power of the lessee. Mich. 38, 39 El. B. R. per Popham and Gaudy.]

[6. So if a man devises lands to J. S. and after bargains and sells to J. D. and acknowledges it before a doctor to be inrolled according to the statute, though it be not inrolled within the six months, yet they shall be a revocation of the will for the cause aforesaid. Mich. 38, 39 El. B. R. per Popham and Gaudy agreed.]

[7. If a man devises lands to another by his will in writing, and after he devises it to another by parol, though this be void as a will, yet it is a revocation of the first will. Mich. 38, 39 El. B. R. per Popham.]

8. W. devised lands in N. to W. of L. Goldsmith, and to his heirs in fee. And afterwards he made a deed of feoffment thereof to divers persons, unto the use of himself for life, without impeachment of waste, the remainder unto the devisee in fee. But before he sealed the deed of feoffment, he asked one if it would be any prejudice to his will? who answered no. And the deviser asked again, if it would be any prejudice?

Poph. 108. pl. 3. S. C. stated as found on a special verdict, but nothing more. —

Mo. 429. pl. 599. S. C. but not exactly S. P.

Mo. 429. pl. 599. S. C. the court inclined that this was a countermand for all. —Poph. 108. S. C. but only a state of it, and nothing said by court or counsel.

2 Salk. 592. in pl. 1. Arg. cites S. C.

2. Salk. 592. in pl. 1. Arg. cites S. C.

Ow. 76. 28 Eliz. C. B. Gibson v. Muteffs, S. P. and the testator when he sealed the

feoffment asked "If this feoffment will not hurt his will, and if it will not, I will seal it?" The court agreed that if he had said, "It shall not be my

will, then it is a revocation; but here his intent appears that the will shall stand, and other lands being contained in the feoffment than were devised, and a letter of attorney therein to make livery in any of the said lands, and the attorney made livery of the other lands, and so the feoffment perfect in part, yet as concerning the land in question, the will is good. — Gouldsb. 32. pl. 7. Gylson v. Platleffe. S.C. held accordingly.

Ibid. Ld. Keeper cites Cro. J. 49. Cook v. Bullock, S. P. and

Vaugh. 259. Gardiner v. Sheldon. S. P. — Revocations arising from *inconsistencies* will never be admitted but where the inconsistency is *plain and unavoidable*; therefore if in the beginning of a will land is devised to J. S. and after in the same will the same land is devised to J. N. the law will make them jointenants, rather than the latter part should be esteemed as a revocation of the former. Arg. 19 Mod. 521, 522. Mich. 10 Geo. 1. in Canc.

prejudice? because he conceived, that he should not live until livery was made, and it was answered no. Then he said, that he would seal it, for his intent * was, that his will should stand; and afterwards livery was executed upon part of the land, and the deviser died, Rhodes and Periam J. held, that the feoffment is no countermand of the will, because it was to one and the same person; but perhaps it had been otherwise, if it had been to the use of a stranger, although it were not executed. Anderfon Ch. J. and others held, that the will is revoked in that part where the livery is executed. And he said it would have been a question, if he had said nothing. Godb. 132. pl. 152. Mich. 29 Eliz. C. B. Winkfield's case.

9. The rule where a *subsequent act* shall amount to a revocation by implication is, that such *implication* must be necessary and wholly *inconsistent*. Per Wright K. 2 Vern. 496. Pasch. 1705. Lamb v. Parker.

10. If a man *devises lands and afterwards mortgages the same for years*, and then *levies a fine sur conusance de droit come ceo, &c.* and not a fine sur concessit; this will be a revocation; but if there had been a *fine sur concessit*, it had revoked only *pro tanto*; per Ld. Chancellor Cowper. Pasch. 6 Ann. Canc.

(Q) Countermand,

[1.] If a man *devises lands to J. S. and after makes a feoffment in fee thereof to a stranger, to the use of himself in fee*, though he hath his old estate, yet it seems this is a revocation, for his intent was to have it by the new limitation, and by the feoffment he passed the estate, and the statute revested it in him, which is as a *new purchase*. Contra, Mich. 38, 39 Eliz. B. R. per Pop-ham.]

Fol. 616.

Cro. C. 24. in pl. 16. Mich. 1 Car. C. B. Arg. S. P. cited to

[2. So if a man *devises lands to J. S. in fee, and after makes a feoffment thereof to another, to the use of himself for life, the remainder to his wife for life, the remainder to his own right heirs in fee*, though here he hath his old reversion, yet it seems that it was his intent to have it pass by the livery, and to be in by the statute and limitation, and so as a *new purchase*, and therefore it seems that this shall be a revocation of the fee, as well as for the life of the

the feme. Contra M. 38, 39 El. B. R. between Montague and Jeffrys, per curiam agreed.] have been adjudged that because

he departed with all the estate it shall be a revocation, and shall not be good without a new publication, and thereupon the court in the principal case there would hear no farther argument as to that point.

[3. If a man having feoffees to his use before the statute of 27 H. 8. had devised the lands to another, and after the feoffees had made a feoffment of the land to the use of the devisor, and after the statute * the devisor had died the land should have passed by the devise, for after the feoffment the devisor had the same use as he had before. D. 6 E. 6. 73. 10. M. 38, 39 El. B. R. agreed.] D. 73. pl. 9. and 11. in the exchequer. The king v. Skrimshire.

4. One devised lands to his sister in fee, and afterwards made a lease to her for six years to begin after his decease, and delivered it to a stranger, to the use of his sister, which stranger did not deliver to her in the life of the testator, but afterwards, which she refused, and claimed the inheritance; resolved, because the devise and the lease made to one and the same person cannot stand together in one and the same person, that it was a countermand of the devise; but it was agreed by all the justices, that if the lease had been made to any other than the devisee, it should not have been a revocation of the will as to the inheritance, but only during the term. Cro. C. 23, in pl. 16. cited per Cur. as 2 Jac. C. B. Coke v. Bullock. * [137] Cro. J. 49. pl. 20. S. C. adjudged. Mich. 2 Jac. C. B. — S. C. cited per Crook. Litt. Rep. 59. as adjudged. — S. C. cited by Ld. Chancellor. Vern. 97. in

pl. 84 Mich. 1682. — 2 Vern. 496. S. C. cited by Ld. Keeper. Pasch. 1705.

5. A feoffment by devisor after the making his will to A. and B. in trust, to the use of the devisor and others, till the devisor limit and order new uses thereof, which he never did, and died, is no revocation in equity. Chan. Rep. 42. 5 Car. 1. Barker v. Zouch.

(R) What Act of the Devisor [is a Countermand of the Will.]

[1.] If the devisor *aliens* the land, and *repurchases*, yet the will is revoked. 44 E. 3. 33. 44 Aff. D. 3, 4 P. M. 143. 55. Contra, 2 R. 3. 3. b.]

[2. If before 27 H. 8. *cestuy que use* had devised the use and after came 27 H. 8. which transferred the use to the possession; this was a revocation, because the use was gone by it, and every man is party to the statute, and by consequence the devisor, and therefore it is a revocation. D. 3. 4 Ma. 148. 54, 55.]

3. E. G. a feme sole, devised her lands to a man and his heirs, whom she afterwards married, and then she died without issue. Adjudged that her marriage was a revocation of her will, for it being her own voluntary act, it amounts in law to a countermand of her will. Swinb. 270. cites 4 Rep. 60. b. 61. a. Mich. 30 & 31 Eliz. C. B. Force v. Hembling. Gouldsb. 109. pl. 16. Anon. but S. C. adjudged no will because she was diss.

abled at the time of her death, and it is at the time of the death of the testator that wills take effect. — And. 181. pl. 217. Anon. S. C. adjudged that the will is void, and the husband shall take nothing by it.

4. If a lease for 20 years be bequeathed to J. S. and after the testator makes a lease for 15 years, this is no revocation, but if the testator after his will made takes a new lease for a longer term so as the former lease is surrendered in fact or in law, this is a revocation, or at least an annulment, for this is another lease, and not that which he had at the making of the will. Wentw. Off. of Executors, 22, 23.

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(R. 2) Will.

Revocation by some other Will.

1. If a feme sole makes a will the 1st of May and gives land, and after May 10 marries and the baron dies May 20, and May 30 the feme dies. This is a void will, though she was then dis-covert, and so the marriage is a revocation. Pl. C. 344. by Lovelace Serjeant, Trin. 10 Eliz. in case of Brett v. Rigden.

2. A man devised lands to his younger son and his heirs, and afterwards he took a wife, and by another will in writing he devised the lands to his wife for life, paying yearly to his son and his heirs such a rent. Anderson and Glamvill held it to be no revocation, but that in this case both wills may stand together unless the latter be contrary to the first will, or that there be an express revocation, and here his intention appears to be only to provide for his wife whom he afterwards espoused, and not to alter it as to his son, and the appointing the rent to him shews that the reversion should be to him. The matter was afterwards ended by arbitrement. Cro. E. 721. pl. 51. Mich. 41 & 42 Eliz. C. B. Coward v. Marshall.

3. If a man seised of land in fee, thereof enfeoffs a stranger unto the intent to perform his will, and afterwards the feoffor makes his will, and devises the same land unto a stranger in fee. In this will the feoffor may alter his will by a later will, because that in this case the devisee shall not have the land but by force of the will, and that cannot take effect but after the death of the devisor. The same law is of land, tenement, rent, common, &c. devisable by custom used in some places, &c. and also the same law is of other chattels real and personal devised, mutatis mutandis, &c. Perk. S. 481.

4. If a man of sound memory makes two wills, that is to say, one in the 6th year of the king, and another in the 8th year of the same king, and after the testator being sick in his death-bed, and dumb, and a man in the presence of his neighbours, delivers both the testaments unto the testator, and he takes them both in his hand, and one of the neighbours desires him to deliver back unto them the testament which he wills should stand and be his last will, and he delivers back unto them the testament with the former date, and keeps the other testament by him; now the testament that is delivered back shall stand, notwithstanding it has the former date, and was written before the other testament, &c. Perk. S. 479.

Cro. J. 691.
pl. 3. Arg.
cites S. C.
— Cro. C.
24. in pl.
16. cites
S. C. — 2
Salk. 592. in
pl. 1. cites
S. C. — 3
Mod. 204.
Arg. cites
S. C.

5. An estate in land [was] devised by will in writing, afterwards [testator] made a verbal will to revoke it. This is not revocation. Toth. 286. cites Moggeridge v. Withers, 13 Car.

6. The testator devised his lands to *W. D. in tail*, and afterwards by a subsequent will he devised the same lands to *Eliz. his eldest daughter for life, remainder to her first, second, and third sons in tail male*, and gave a rent charge of 1000*l.* per annum to the said *W. D. for life*, both which wills were duly published; but the testator, a little before he died, declared, that his first will should stand and be his will. The court charged the jury to inquire if the publication of the first will in such manner after the publication of his last will, was not a revocation of the last will, who found that it was. 2 Sid. 2. 3. Mich. 1657. *B. R. Colt v. Dutton.*

7. A. by will in writing devised lands, and a year after he made another will in writing but devised no lands by the last will. The court delivered their opinions in this case, viz. That they were not satisfied the second will did revoke the former, because it is not found that any lands were devised by this second will, so that it may be, or it may not be, consistent with the former; and where the matter stands indifferenter, the court will not suppose a revocation of a former will solemnly made. But Hale Ch. Baron held, that a second substantive independent will, though it do not by express words import a revocation of a former will, nor passes any land, will yet amount in construction of law to a revocation; but here it being in doubt whether this were so or not, he held there was not sufficient matter found for the court to construe it to be a revocation; for it may be, for aught appears to the contrary, that the second will in this case was a confirmation of the former. Hardr. 376. in pl. 3. Mich. 16 Car. 2. *Seymour & Ux. v. North-wortly.*

8. 29 Car. 2. cap. 3. s. 22. No will in writing concerning any goods or personal estate shall be repealed, nor shall any clause or bequest therein be altered by any words, or will by word of mouth only, except the same be in the life of the testator committed to writing, and read to the testator, and allowed by him, and proved to be so done by three witnesses.

9. A. devised 400*l.* to be laid out in finishing a house, and afterwards lays out as much himself, but the house was not finished. The 400*l.* shall not be allowed though it was insisted that after A. had laid out more than the 400*l.* he declared a little before his death, that whether he lived or died that work should be finished. Vern. 95. pl. 83. Mich. 1682. *Husbands v. Husbands.*

himself, but says it was unfinished when he died; and that the will was good as to personal estate, but not as to the land.

10. A will was duly made and signed by the testator, and a revocation was wrote on the same paper but not signed by testator, it is not sufficient within the statute of frauds. 3 Lev. 86. Hill. 34 Car. 2. *C. B. Hilton v. King.*

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2 Chan. cases. 127. S. C. but says nothing as to the testator's laying out so much

Freem. Rep. 541. pl. 733. S. C. adjournatur. — 2 Vera. 742. cites

S. C. as adjudged that it should not amount to a revocation.

Parliament
Cases 147.
Hungerford
v. Basset.
S. C. and P.
— 3 Mod.
no 8. S. C.

11. *Two wills without date* so that you cannot tell which is the first and which is the last, they shall be both void, because by making the latter the first is gone, and you cannot tell which is the latter, yet one of them must be the latter. Arg. Show. 550. Mich. Jac. 2. in case of Hitchins v. Basset.

12. A man *devises to his son his lands to him and his heirs*. Afterwards he makes another will, and thereby he *did devise the same lands to his wife for life, paying the son, &c.* and the question was, whether this last will was a revocation of the former? Serjeant Maynard Arg. takes notice that this case was (as he says) finely cited, and that they told you two lawyers were of opinion it was none; they might have been pleased to have given due honour to them, and the serjeant says, it was the Ch. J. Anderfon and Glanvill a very learned judge. And why was it no revocation? Because they both stand together. This case Anderfon reports as his own opinion, as a judgment upon the bench by him and Glanvill, and it seems there was no other judge upon the bench. Show. 541. Mich. 4 Jac. 2. in case of Hitchins v. Basset.

Arg. Show.
548. agreed
by the other
side.

13. A. devised lands to J. S. and after devised them, 1st. *To a monk.* 2dly, *To a corporation.* 3dly, *To a parish* where all are *incapable to take*; these are *void wills*, and yet they are a revocation. Arg. Show. 544. Mich. 4 Jac. 2. in case of Hitchins v. Basset.

Ibid. says
the judg-
ment was
afterwards
affirmed in
the house
of lords.
— 3 Mod.
203. 209.
S. C. ad-
judged, and judgment affirmed accordingly.

14. A *subsequent will of lands which does not appear though found by verdict*, that such a will was made, but that *what the contents of such will were, they did not know*, is not a revocation of a former will; for * such after will may concern other lands, or no lands at all, or may be a confirmation of the former; adjudged. 2 Salk. 592. pl. 1. Trin. 5 W. & M. in B. R. Hitchins v. Basset.

Comb. 90. Nofworthy v. Basset. S. C. adjudged and affirmed accordingly. — Show. 537. to 556. S. C. argued, but no judgment. — Show. Parl. Cases 146. Hungerford executor and devisee of Basset v. Nofworthy. S. C. on a writ of error brought in the house of lords, and judgment affirmed there.

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15. Revocation must be by a writing *operating as a will*, or by a writing by which the testator *declares his intention to revoke the first will.* 3 Salk. 396. pl. 3. Anon.

16. Devise of lands in S. *to his son A. for 99 years, determinable upon three lives, and by his will charges the said lands with an annuity of 40 l. per ann. to his daughter M. and afterwards devises the same lands for 99 years, determinable upon three other lives, reserving 50 l. a year rent*, this is, during the continuance of the lease, a revocation, but it is *no revocation as to the 40 l. per ann. annuity*, there being rent enough reserved to satisfy that MS. Tab. Feb. 14th. 1706. Parker v. Lamb.

MS. Rep.
Nov. 25,
1734. Hyde
v. Mason.

17. Samuel Mason of Westminster Esq. 23 June 1729, made his will, and two duplicates of it were *executed before three witnesses*, and Mr. Limbrey, and Dr. Calamy (deceased) were made executors, and one of the duplicates was delivered to Mr. Limbrey, one of the executors. Samuel Mason died 2 Oct. 1730, and about three weeks before his death made several alterations and obliterations with

with his own hand in the duplicate remaining in his own custody, making a new devise of his real estate, and a new residuary legatee, and a new executor, entirely striking out the names of the first devisees, residuary legatee and executors, and altered several of the former legacies, and inserted or interlined new legacies. And soon after wrote another will with his own hand, agreeable in great measure, but not altogether, to the will or duplicate so altered, with the conclusion in these words, "*In witness whereof I the said testator have to each sheet set my hand, and to the top where the sheets are fixed together, my hand and seal, and to the last thereof my hand and seal, and to a duplicate of the same tenor and date this day of* 1730." But there was no signing or fixing together. Testator soon after began to write another will, word for word with the last, so far as it goes, but went no farther than devising his lands.

Testator lived six days after, and was in good health, and might have finished and executed both or either of the latter wills if he had thought fit. Testator never sent to or called upon Mr. Limbrey for the duplicate of the first will in his hands, though Mr. Limbrey lived here in town. After death of testator all the testamentary papers or schedules were found lying all in loose and separate papers, upon a table in his closet, not signed or executed, and the duplicate of the first will was found on the same table, altered and obliterated (*ut supra*) with his name and seal thereto, whole and uncanceled.

Upon contest in the prerogative court sentence was given for the duplicate of the first will in Mr. Limbrey's hands, and upon appeal to the delegates the sentence was confirmed by lord Raymond, Ch. J. of B. R. and Mr. Justice Probyn, Dr. Tindall and Dr. Brampston, (who were all the delegates present) after four days solemn hearing.

And upon the petition of Hide (the executor named in the new mentioned will) a commission of review was granted; the petition was heard before Lord Chancellor King 16th or 17th. of March, 1732, and now after farther hearing, &c. before the commissioners of review, the former sentence of the prerogative court was again affirmed by opinion of all the delegates except Dr. Pinfold, viz. of the judges, the Ch. Baron Reynolds, Justice Page and Baron Comyns, and the two doctors of the civil law, chiefly on the reason (*ut audiui*) that the testator did not intend an intestacy, and by the alterations and obliterations in his own duplicate of his first will, he appeared only to design a new will, which as he never perfected, the first ought to stand, and testator not calling for, &c. the duplicate of his first will in Mr. Limbrey's hands, strengthens the presumption of his intent, not absolutely to destroy his first will till he had perfected another, which he never did.

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(R. 3) Revocation by some other Will.

Though not good in all Respects.

Carth. 79. S. C. and P. and that the court held clearly that it could not operate as a revocation, because that would be

1. **A.** By will duly executed devised lands to B. and after by another subsequent will revoking all former wills *subscribed by the testator in the presence of three witnesses, but not attested by them in A's presence*, or where A. could possibly see them; adjudged, that the second will must be a good will in all circumstances, to revoke a former will. 3 Mod. 258. Mich. 1 W. & M. B. R. Eggleston v. Speke alias Petit.

contrary to the intent of A. For A. plainly designed it as a will, and not a revocation, because it bears the title of her will. — Show. 89. S. C. adjudged. And there it appears that the lands were by both wills devised to B. so that the *last will was consistent with the first*, and did no ways contradict A's former intention of giving the land to the defendant. — S. C. cited Arg. Wms's Rep. 344. in the case of Onions v. Tyrer, and argued that the revoking intended by the clause in the statute (S. 6) was such as should be purely with an intention to revoke or destroy a former will. And thereupon Ld. Chancellor said, that he allowed the case of Eggleston v. Speke, in regard there the *second will devised the lands to the same person* as the first did, and that therefore it may truly be said that the second will did not intend to revoke the former, but rather to confirm it; but that had the later will been otherwise, and there had been no devise of the land, or had extended only to personal estate, then the general clause of revoking all former wills might have been a good revocation; and if the later will had given the lands to a third person, it should not let in the heir, the intention thereof being to give the second devisee what it took from the first, without regard to the heir, and if the second took nothing, the first could lose nothing. Hill. 1716. Ibid. 344, 345. — Though in a *later will* there is an express clause of revoking all former wills, yet that later will *being void* by the witnesses not attesting it in the testator's presence, that would not amount to a revocation, it being intended to operate as a will, and not otherwise as an instrument of revocation; per Cowper C. 2 Vern. 742. Hill. 1716. in case of Onions v. Tyrer, says it was so adjudged in case of Eggleston v. Speke. 3 Mod. 258. Show. 89. and in case of Hilton v. King. 3 Lev. 86. — S. P. by Lutwich J. accordingly; but Mountague Ch. J. and Street J. e contra, 3 Mod. 218. Trin. 4 Jac. 2. C. B. Hoil v. Clerk.

And says that this was approved by

2. A subsequent devise to a person incapable of taking, is a revocation of a precedent devise to a person capable. 10 Mod. 233. Pasch. 13 Ann. in Dom. Proc. in case of Roper v. Radcliffe.

the counsel on both sides as good law. Ibid. — Devise of lands to A. and afterwards devisor devises the same lands to B. who was a papist, both devises are void; for though the last is void as a will, yet it is good as a revocation. MS. Tab. July 11, 1713. Roper v. Constable.

[142] (R. 4) Revocation by Obliterating, Tearing, &c.

29 Car. 2. cap. 3. s. 6. **N**O devise in writing of lands, tenements or hereditaments, or any clause thereof shall be revokable, otherwise than by some other will or codicil in writing, or other writing declaring the same, or by burning, tearing, or obliterating the same by the testator, or in his presence, and by his direction and consent, but shall continue in force until, &c. or unless altered by some other will or codicil in writing, or by some other writing of the devisor, signed in the presence of three or more credible witnesses, declaring the same.

2. A.

2. A. by will in writing, consisting of nine sheets sealed, &c. by him, gives all his real and personal estate to B. her heirs executors, &c. in trust to pay his debts and legacies, and takes notice, that he sealed every sheet; afterwards A. directed his attorney to make a new will according to such directions, and on the attorney's bringing the *paper of instructions A. signed them*, and thinking he had made a new will *tears off eight of the seals*, but being informed otherwise by the attorney, he *said he was sorry, and so tore off no more*. The latter declaration in writing was a sufficient revocation of the former will, as to the personal estate, but the other remained good for the real, it being duly executed. 3 Ch. R. 155. Hill. 6 Ann. Hyde v. Hyde.

Equ. Abr.
409. pl. 3.
S. C. —
S. C. cited
Comyns's
Rep. 455.
in case of
Limbery v.
Mafon.
Trin. 8 Geo.
2. Coram
Delegatus.

3. A man makes his will in writing, and signs, seals and publishes it in the presence of four witnesses, who attest and subscribe the same in his presence; and thereby gives to H. P. his son, and to his heirs and assigns for ever, his lands, &c. in the parish of Wood, &c. Dec. 1715. The second of January following he orders one Q. to make an alteration in his will, and *interlines* these words, *I give unto my wife A. P. and her assigns my lands in W. for her life, and after her decease to my son H. and his heirs*. The will is read to the testator, and he *approves of it*, with the interlineation. He *puts his seal upon the wax in the presence of three of the same witnesses, but does not write his name de novo, neither do the witnesses subscribe theirs de novo*; Quære, whether this were a good devise to A. for her life; the doubt was chiefly upon Par. 6. 29 Car. 2. cap. 3. whether this alteration was not a revocation within the statute; every bequest is to continue in force until the same be burnt, &c. by the testator or his direction, in his presence, or unless the same be altered by some other will, or other writing of the devisor signed in the presence of three or four witnesses declaring the same. If the will be signed, it may be in any part; and per Parker and Eyre, the *putting a seal is a good signing*, for, by Parker Ch. J. the intention of the parties signing it, and the witnesses attesting, is only that the witnesses may know it again. This act is fully penned, and is not to be expounded away. Per Powis here is no danger of fraud or perjury. Here is a new devise, and not only an alteration. Per Eyre every thing is right save the new subscribing by the witnesses. The case of Lee v. Libby, in Show. 68, 69, is right, no body can say this new bequest was signed in the presence of the testator. Per Eyre and Parker there must be more than a bare revocation. It must be signed in the presence of witnesses; the altering a will must be understood of a revoking, i. e. an alteration by revocation, the latter implies of the whole will, the former of any part, otherwise this altering will clash with the former clause; so that if the testator revokes the whole or part, it shall be by will or writing, signed in the presence of witnesses, but they are not obliged to subscribe. Per Eyre if H. P. had been here found heir at law, then A. the lessor of the plaintiff might have been helped; for if this be an alteration, so as H. is not to have the lands till after A's death, she will have an estate by operation and

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and implication of law. Pasch. 10 Ann. B. R. Townshend v. Pearce.

Ch. Prec.
460. Hill.
1716. S. C.
—10 Mod.
467. Arg.
S. C. —
Per Cowper
C. Wms's
Rep. 345.
S. C. —
Gilb. Equ.
Rep. 130.
Anyons v. Fryers. S. C. that it is no revocation. — Equ. Abr. 407. (E) pl. 1. S. C. that it ought to be set up again in equity.

4. A. on making a second will of land, which proves void for want of due attestation *cancelled a former* duly made of the same lands and much to the same effect *thinking the last will perfect*. The supposition of the last will being good and the cancelling it not being with design to revoke the devises as to the real estate, but intending to do the same thing by his second will brings this under the head of accident, and equity will set up the first will again, and per Cowper decreed accordingly. 2 Vern. 741. Hill. 1716. Onions v. Ticer.

S. C. cited
by Cowper
C. 2 Vern.
741. as so
resolved
— Chan.
Prec. 461.
S. P. held
clearly, the
original
and dupli-
cate being but one will, and therefore must stand or fall together.

5. The testator a little before his death *sent for his will out of his scrutoire in the presence of several persons, cancelled it and said, I cancel my will, and desired them to bear witness of it; and the next day told his physician, he was not in his body, but easy at his heart, and* this was looked upon as a sufficient cancelling the other duplicate that he had not by him. Comyns's Rep. 453. Trin. 8 Geo. 2. and cites it as so held in Sir Edward Seymour's case, who died 18 Feb. 1708.

(R. 5) Revocation by Act of God.

If a man
fanz me-
morie
makes his
will, and
after be-
comes non

1. IF one makes his will and afterwards becomes lunatick, whether this *lunacy* is a revocation of a will made while *compos mentis*? Charlton J. doubted, but the reporter says, without doubt lunacy is not a revocation. Vern. 106. Mich. 1682, in case of Sackvill v. Aylworth.

fanz memorie, he cannot countermand his will, and yet the disability or imperfection of non sanz memorie is not any countermand of it. 4 Rep. 61. a. Mich. 30 and 31 Eliz. C. B. Arg. in case of Forre v. Rembling. — And. 181. pl. 217. S. C. and S. P. Arg. — Goldsb. 109. pl. 16. S. C. and S. P. held accordingly by Anderson Ch. J. For it is common that a man a little before his death has no good memory. But Shuttleworth serjeant said, he did not agree that law to be so. Windham J. said, he did not doubt but such a will should be good; but Rhodes J. said, if a man makes his will, and after becomes non compos mentis, and then lives three or four years after, it is no reason that such a will shall be good; and he cited 3 E. 3. 1 in. Northt. — Swinb. 68, 69. Part 2. S. 1. (3) that it does not disannul the preceding testament, the rather because this infirmity proceeds from the visitation of God, and not by any voluntary act of the party.

(R. 6) Revocation by Act of Law or Alteration of Estate in Devisor.

Finch. De-
vis. pl. 17.
cites S. C.
but is not

1. NOTE, per Yelverton and Markham, if a man *devises his land, and after is disseised and dies*, the devise is void; for a devise cannot take effect unless the devisor dies seised, and therefore

therefore it is a good plea against a devisee that the deviser did not die seised, not denying the devise. Quære, if it be a good plea that the deviser had nothing * in the land at the time of the devise; as if he is disseised and devises, and *after re-enters*, &c. Br. Devise, pl. 15. cites 39 H. 6. 18.

the S. P. nor is the point there mentioned in the year-book cited. — If in

pleading a devise of land a man says, that A. made his will in writing, but does not say, that A. died seised, this is not good pleading; per Ellis J. for if the *issue* of the deviser was *turned to a right at the time of his death*, the will cannot operate upon it. Mod. 217. Mich. 28 Car. 2. C. B. in case of Ingram v. Tothill and Ren. — S. C. cited by Holt Ch. J. 11 Mod. 123. Trin. 6 Ann. B. R. in delivering the opinion of the court, and said, he was of opinion, that if the disseisor re-enters, the lands shall pass; because when a man is disseised, and he makes a re-entry, that such entry purges the disseisin, and the disseisee by relation, to all intents and purposes, is in the possession from the beginning; and for that reason, he shall have an action for the mean profits, between the time of the disseisin and bringing the action; and so is 38 H. 6. 27. 19 H. 6. 17. He may in such case be justly said to be seised in fee of such lands, and therefore may dispose of, and devise the same away; because the entry reverts the estate, and he is now in consideration of law, in possession from the time of the disseisin, and therefore is intitled to the mean profits, as though he had been actually in possession all the while.

2. If the father by his will in writing, *devises lands to his younger son*, and the elder son knowing thereof enters into the land and disseises the father, and so continues till the death of the father, by which the will is void, yet because it was made void by deceit and covin, it shall be made good in chancery. Roll's Abr. Chancery (S) pl. 3. Mich. 16 Jac. by the Lord Chancellor in Roswell's and Every's Case.

3. T. R. had issue by two several women two sons, F. his eldest, and W. his younger, and *devised his lands to F. to the use of himself for life, and after to the use of the heirs males of his body*, and for want of such issue, to the heirs males of W. and the heirs males of their bodies for ever; and for default of such issue to his own right heirs. And afterwards he made a lease to W. his son for 30 years, to begin after his death, and died without alteration of his will. W. entered and surrendered to F. who let the land to the defendants. Resolved, that *this lease made to W. to begin prout was not a revocation of the whole devise totally of the inheritance, but quoad the term only*. Cro. C. 23. pl. 6. Mich. 1 Car. C. B. Hodkinson v. Wood.

Cro. J. 690. pl. 3. Mich. 22 Jac. C. B. the S. C. Hutton and Winch being only in court, conceived it to be doubtful, & adjournatur. — S. C. cited Show. 421. 439. Arg. that a con- Arg. cites S.

istent devise is no revocation. — Ibid. 542. Arg. cites S. C. — 2 Salk. 592. pl. 1. C. — S. C. cited 3 Mod. 205. Arg.

4. After a devise in fee the testator *mortgaged the same for 200 l. to be repaid at three years end*, but within the three years he fell sick and declared he would not alter his said will; this is a revocation. Chan. Rep. 153. 17 Car. 1. Thomas v. North.

5. If one holds lands in common with another, makes his will and *devises all his lands and after makes a partition by agreement and not by writ* according to the statute, whether this partition be a countermand? Quære. Sid. 90. pl. 10. Mich. 14 Car. 2. B. R. Le-Strange v. Temple.

Keb. 359. S. C. held per Cur. in C. B. and now in B. R. to be a revocation. S. P. where T. was tenant in common of a manor, and devised

6. R. S. and T. are tenants in common. T. makes his will in *writing of his third part*, and after by indenture and fine partition is made betwixt the tenants in common; and if this partition be a revocation of this will was the question. And it seemed to all the

*all his interest
in the manor;
and after-
wards a
partition was
made, and*

barons, viz. Montague, Littleton, Thurland and Bertie, that it is not any revocation; but judgment was not given, because the plaintiff obtained leave to discontinue his action. Raym. 240. Pasch. 26 Car. 2. B. R. Risley v. Baltinglaff.

a fine levied to corroborate the partition; and the question was, whether this fine and partition was a revocation or not? and adjudged by the opinion of the Ch. J. and Tracy, that it was no revocation; because here is no intent to revoke, nor any material alteration of the estate; for whereas the devifor before had a third part in the manor, after partition he hath a third part of the manor. But Blenco was of opinion, that the making of partition was a revocation, Freeman. Rep. 543. pl. 735. Mich. 1683. in C. B. Webb v. Temple.

* This seems misprinted as to the year, Tracy and Blenco not being then justices. — And by a MS. case of Sir Richard Temple's, Mich. 4 Ann. C. B. it seems to be S. C. and held that it was not † a revocation, for in every revocation there are three things required; 1st, That the devifor should expressly declare his mind that his will should be revoked. 2^{dy}, That the estate devifed ought to be altered, which is an implied revocation. 3^{dy}, That the thing devifed be altered.

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7. A. devifed *four tenements* to his wife in satisfaction of her dower, with election to take the dower or the legacy. Afterwards A. *sold one* of the tenements and died without new publication. The wife insisted to have satisfaction for the tenement sold. Per Ld. Chancellor she must take the will as it was at the time of the death of her husband, for till then it is no will; let her choose the one or the other, but she may not have both. Decreed accordingly. 2 Chan. Cafes 24. Hill. 31 & 32 Car. 2. Axtell v. Axtell.

8. A *deed of trust* made by way of caution by a melancholick person to *prevent a forfeiture* in a case which never happened, is no revocation of a will. 2 Chan. Rep. 210. 32 Car. 2. Coles v. Hancock.

9. *Tenant in tail* makes his will and *devifes his land, and then by bargain and sale inrolled makes a tenant to the praecipe, against whom a common recovery is suffered with voucher of tenant in tail* to the use of himself in fee, this is a revocation; for by the bargain and sale and recovery all the estate is altered after the will. 3 Lev. 108. Hill. 34 Car. 2. C. B. Difter v. Difter.

10. A. devifed land to be sold by his executors for payment of his debts, and after *conveys it to trustees for payment of debts*, this is a revocation. 2 Chan. Cafes 116. Trin. 34 Car. 2. Culpepper v. Aston.

Ibid. 341.

pl. 334.

Mich. 1685.

S. C. Ld.

Chancellor

confirmed

the decree, and declared, that though it was a revocation at law, yet in equity it shall not be taken for a total revocation, but the *devifor shall be admitted to the redemption*; for the intent of making the mortgage could be no other than only to serve his special purpose of borrowing money to supply his present occasions. — 2 Chan. Rep. 297. 299. Hall v. Dench. S. C. decreed and affirmed accordingly.

12. The statute of frauds has not taken away revocations of last wills by *aets in law*; as if the testator should afterwards make a *fessment* contrary to the will or any other *aet inconsistent with it*; but such revocations remain as they were before the making of this statute. Cited Carth. 81. Mich. 1 W. & M. in B. R. to have been so held per Curiam in their argument in the case of Eccleston v. Speke.

13. A. devised a lease to his daughter, and afterwards A. renews the lease; whether this is a revocation? 2 Vern. 209, Hill. 1690. *Alford v. Earle*.

N. Ch. R. 162. S. C. says it is; but that the

annexing *codicils* amounted to a new publication. — But where a devise is to J. S. and his heirs, if J. S. die, a new publication after his death will not carry it to his heir. 2 Vern. 209 *Alford v. Earle*. Cites Pl. Com. 342. *Brett v. Rigden*. — It is a revocation, Goldsb. 93. pl. 6. Trin. 36 Eliz. by all the justices. *Ashby v. Lever*. — Gibb. 228. per Holt Ch. J. cites Goldsb. 93. — 11 Mod. 126. S. C. cited by Holt Ch. J.

14. A. devised lands in trust to pay debts, and then to pay his wife 200l. per annum for her life. A. lives many years after, and his debts increased from 2500l. to 10,000l. the trustees being bound with him for 8000l. A. by deed and fine, in which his wife the now plaintiff joined, conveyed the premises to the said trustees and their heirs to sell to pay debts, and the surplus to him and his heirs. If this was a revocation of the will as to the 200l. per annum to the wife? or if the surplus after the debts paid shall not be liable to the 200l. per annum? decreed for the wife. 2 Vern. 241. pl. 225. Mich. 1691. *Lady Vernon v. Jones & al'*.

All the three Lords Commissioners held that neither the mortgage and fine, nor deed of trust, shall be a total revocation of the will, being made

for particular purposes, but that after debts paid, the widow is to have the 200l. per ann. Chanc. 32 S. C. — The devise of the 200l. per ann. was on condition she released her dower. Chanc. * Prec. 32. *Vernon v. Jones*. — 2 Freem. Rep. 117. pl. 133. S. C. all the three commissioners were of opinion, that the surplus being to his own right heirs, that was still in his own power, and should be subject to his disposal by the will; and the case of *Hall v. Dench* was cited, where after a devise of lands, the deviser made a mortgage in fee, and adjudged that the devisee should have the equity of redemption.

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15. Bargain and sale without enrolment, and a grant of reversion without attornment will revoke a will, and yet these are void acts. Arg. 2 Salk. 592. pl. 1. Trin. 5 W. & M. in B. R.

Wentw. Off. of Executors, 22.

16. Alteration of estate, as from an estate tail to a fee simple by a common recovery suffered after making the will is a revocation. Per Trevor Ch. J. Gibb. 241. cites it as adjudged in *Show. Parl. Cases* 154. [Trin. 1695.] in *Ld. Lincoln's case*.

So by surrender of a lease, and taking a new one, Goldsb. 93. pl. 6.

Ashby v. Lever. — Wentw. Off. Executor 22. — So it is as well of a surrender in law as in fact. Wentw. Off. Executor 22, 23. — But a bare covenant to make such alterations of estate, is not of itself sufficient revocation without an actual alteration. Wentw. Off. Executors 22.

17. A. being an earl and seised of a good estate, which he then intended should go with the title, made several wills to that purpose principally, and with very little variation. But at length entertaining some thoughts of marrying M. S. he by lease and release conveyed his whole estate to J. N. and J. R. and their heirs, to the use of A. and his heirs, till the intended marriage should take effect, and after then as to part in trust for his intended wife and her heirs and assigns for ever, and as to the rest to other uses, with a proviso of power of revocation by his last will and testament, or any other deed in writing attested, &c. and for want of such after to be made will or deed, then in trust for A. his heirs and assigns for ever. A. died without marrying; the devisee in the former wills, and who succeeded to the honour, exhibited a bill after A's death to set aside the deeds of lease and release, and to have the will executed, and among other things insisted, that not only the marriage did not take effect, but also that there never was any serious overture made by A.

Abr. Eq. Cases. 411, 412. Trin. 1695. S. C. — 2 Freem. Rep. 202. pl. 277. Earl of Lincoln's case S. C. resolved that it was a revocation, and says that upon appeal it was so held in the House of Lords, carried by two lords only.

by A. on that behalf. But the bill was dismissed, and that dismissal affirmed in the House of Lords. *Show. Parliament Cases 154. Earl of Lincoln v. Roll, & al'.*

a Freem.
Rep. 284.
pl. 355. S.
C. Ld.
Keeper
seemed of
opinion,
that it was
not a revoca-
tion, but
referred it
to the
judges of B.
R. by way
of a case.

18. A. devised to his son B. a house, &c. *for 99 years, if three lives live so long*, paying C. his sister 40l. per ann. for her life. A. afterwards makes a *lease to J. S. for 99 years, if three lives live so long*, paying 50l. per ann. to A. and his heirs, and a fine paid of 300l. decreed at the Rolls that it was a revocation. But reversed per Wright K. who held it no revocation; for the lease to J. S. commenced immediately in the life of A. but B's was for 99 years from A's decease, and though both determinable on 3 lives, and that possibly J. S's. lives might live longest, yet a *reversionary interest passes*, and will carry the rent reserved in J. S's lease. 2 Vern. 495. pl. 446. Pasch. 1705. *Lamb v. Parker.*

19. The law requires a *continuance of the same interest*, that the devisor had at the time of making the will *to remain unaltered, even to the time of his death*; for that any, even the least alteration of this interest, is an actual revocation of such will. Per Trevor Ch. J. in delivering the opinion of the whole court. 11 Mod. 157. Hill. 6 Ann. C. B. in case of *Archer v. Bokenham.*

Tenant in tail, remainder to himself in fee, devises his lands to J. S. and then suffers a recovery to the use of himself in fee, and dies without issue male, this is a revocation of the will. 3 Wms's Rep.

20. As where there is a *tenant in tail*, and he makes a will, and devises these lands away; now though he has an inheritance in these lands, and they are his own, and he could dispose of the absolute inheritance and fee simple by fine and recovery, yet if *after the making such will*, at any time before his death, *he suffers a recovery* to him and his heirs, and alters the estate from a tail to a fee, this is so * far from making his will good, that it is an actual revocation of the will, yet he was owner of the land when he made the will, and is no more now, but only the estate is altered, and he has now another sort of fee. 11 Mod. 157, 158. in case of *Archer v. Bokenham.*

163. pl. 40. Hill. 1732. *Marwood v. Turner.*

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21. And further, where there is *tenant in fee simple*, and he *devises* his lands away to another, and after that, and sometime before his death *makes a feoffment* of these lands to another, *to the use of himself and his heirs*; though this to some purposes is no alteration, for he is absolute owner of the estate as before, yet this does not make the will good, but it is a revocation thereof; and so it was adjudged in the case of LORD LINCOLN, though so small an alteration was in the estate. 11 Mod. 158. in case of *Archer v. Bokenham.*

22. If a man *deviseth lands in fee*, and afterwards *mortgages the same in fee* to another, this is no total revocation, but the equity of redemption shall pass by the devise. Admitted to be a settled rule in chancery. 1 Salk. 158. pl. 10. Mich. 8 Ann. in *Canc. York v. Stone.*

23. A. *articles to purchase land*, and devised those lands, and after the date of the will takes a conveyance to himself and his heirs; *Quære*, whether this be a revocation? 2 Vern. 680, at the end of pl. 604. Hill. 1711. *Greenhill v. Greenhill.*

34. A.

24. A. by his will dated in 1708, gave several pecuniary and specific legacies, and then gave *all his real and personal estate*, after all his debts and legacies paid, to B. *on condition he took the name of A. upon him, and the heirs male of his body*, with divers remainders over; afterwards in 1709, A. together with J. S. his trustee, by *lease and release conveyed several manors to trustees and their heirs*, to the use of *himself for life*, without impeachment of waste, and that the trustees and their heirs should execute such conveyance and conveyances thereof, as A. by writing under his hand and seal, or by his last will, &c. should direct or appoint. In 1710 A. died without altering or revoking the said will, or making any other appointment touching the said real estate. Decreed, that the lease and release was a revocation of the will. Abr. Equ. Cases, 412. Mich. 1712. Pollen v. Husband.

Wms's Rep. 751. pl. 17. Pollen v. Husband, in a different point. — Lill. Pract. Conv. 393. in case of Fitz-Gerald v. Ld. Fauconberge, cites S. C. and says that the conveyance mentioned, that for default

of such appointment, the trust should be to the use of him and his heirs; and *ibid.* 402. Lord Chancellor said that this case was affirmed in the House of Lords.

25. Sir Michael Armyn devises lands to an executor for payment of debts, and recites that a particular schedule of them was annexed to the will, remainder over; afterwards he mortgages part of the same lands, and pays most of the schedule debts with the money. Decreed, that this mortgage is not a revocation, neither in all nor part, and that the will ought to extend to all the debts that should be owing at the time of his death, and not to the schedule debts only, and that the mortgage was only a security, and not an appointment how it should be made, but this decree was reversed, but without prejudice to the heir at law. MS. Tab. May 21, 1717. Bernadiston v. Carter.

26. A man had five sons, and by his will gave a college lease to his second son, and having made a suitable provision by his will for all his other sons, bequeathed the surplus of his estate among all his five children, after which the testator renewed the college lease, and the eldest son brought his bill as one of the residuary legatees, for his share of this college lease, supposing the devise of it to the second son to be revoked by the subsequent renewing thereof; and this being at that time solemnly debated, the Master of the Rolls held it a case of very great consequence, * and that it might prove very inconvenient, and an hardship to construe that to be a revocation of the bequest, which in all probability was intended for the benefit of the legatee; his Honour therefore ordered the master to state the matter specially, and reserved costs; whereupon the eldest son was well advised, and proceeded no further in this cause, but permitted the second son to enjoy the lease devised to him, notwithstanding the pretended revocation by the renewal; so that the authorities were rather for the plaintiff than against him. 3 Wms's Rep. 168. cites it as heard at the Rolls, the 15th June 1722, in the case of Adean v. Templar.

testator had put all out of him, and divested himself of the whole interest, so that nothing left for the devise to work upon, the will must fall, and the new purchase being of a freehold descendible, could not pass by a will made before such purchase; and Ld. Chancellor wondered that this case, which must often have happened, had not been before determined. 3 Wms's Rep. 166. 170. Hill. 1732. Marwood v. Turner.

M. was seized of a lease for lives, and by his will devised it. Afterwards M. surrendered the old lease, and took a new one to him and his heirs for three lives. Decreed that this was a revocation of the will as to this particular; for by the surrender of the old lease, the

there being And his lordship thought this

27. A. having a wife and two daughters, devised to his wife six houses in bar of dower, and all his real and personal estate to his daughters

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case the stronger, because after the articles entered in-to, *A.* executed a codicil confirming his will subject to the articles, which confirmation was a republication of his will, as if he had wrote it

over again, or had afterwards, for a valuable consideration, assigned over a moiety of his real and personal estate to his said daughter, by which the said moiety so disposed of did no longer continue any part of A's estate, so that by devising afterwards a moiety of his real and personal estate it must be intended the remaining moiety only, and to have divided that moiety into moieties. *2 Wms's Rep. 328. 333. Hill. 1725. Rider v. Wager.*

daughters in moities, and after in consideration of the marriage of *J. S.* with one of the daughters, covenants to settle a moiety of his real estate to the use of himself for life, remainder to the use of *J. S.* and wife for their lives, &c. Lord C. King held this to be but a covenant, and therefore at law no revocation of the will which disposed of the real estate, but it being for a valuable consideration, was in equity tantamount to a conveyance, and consequently in equity a revocation of the will as to the moiety of the six houses devised to his wife, so that *J. S.* was intitled to one clear moiety of the real estate, but she to have a satisfaction out of the other moiety, and the other residue of the moiety to be between the two daughters equally. *2 Wms's Rep. 328. 332. Hill. 1725. Rider v. Wager.*

28. *Grant of reversion without attornment* is a revocation, though the land did not pass by the grant for want of attornment. *Went. Off. Executors, 22.*

29. Some hold that if deviser makes but a lease, leaving the freehold as it was, this amounts to a revocation, but of this *Quere*, and if a difference may not be between a lease for years and a lease for life, which alters the freehold. *Went. Off. Executor, 22.*

MS. Rep. 4
Apr. 1730.
Luther v.
Kirby.

30. Dorothy Kirby by her will taking notice that she was tenant in common by devise of her father with *E. Vaughan* wife of *Richard Vaughan*, to them and their heirs for ever, equally to be divided between them of the manor of South-Bemfleet, &c. did devise unto *Edward Luther* and *John Kirby* and to her daughter *E. Wright* and their heirs, all and singular her moiety of the said manor and lands, upon trust to sell the same, and by the money arising by sale (her debts and funerals being discharged) to pay unto her son *John Kirby* 100*l.* and to his two children *John* and *Elizabeth Kirby* 500*l.* a piece at their ages of twenty-one, and in the mean time to place out the said two sums of 500*l.* at interest, and to apply the same for the education, and maintenance of the said children, &c.

The said Dorothy Kirby and *Richard Vaughan*, and the said *Elizabeth* his wife came to an agreement to divide the said manor and lands, and thereupon by indenture bearing date 16 May 1722, between the said Dorothy Kirby and the said *Richard Vaughan* and *Elizabeth* his wife of the one part, and *C. Jefferies* and *John Rhet*, Gent. of the other part, reciting and taking notice that the said Dorothy Kirby, *Richard Vaughan* and *Elizabeth* his wife, had agreed to make a just partition of the said manor and lands, therefore they did severally covenant to levy a fine of all and singular the messuages, farms, lands, tenements, woods and hereditaments, in the said indenture particularly described, and declared the uses thereof as to certain farms and lands in the same indenture particularly described to the use of the said Dorothy her heirs and assigns for ever, and as to all other messuages, farms, lands, tenements, woods

woods and hereditaments in the said indenture particularly described of which no use is declared to the said Dorothy Kirby, to the use of the said Richard Vaughan and Elizabeth his wife, their heirs and assigns for ever, which said fine was levied accordingly.

In the year 1724, the said Dorothy Kirby departed this life without revoking or altering her said will and left the said John Kirby her only son.

Lord Chancellor declared that the will of the said Dorothy was well proved, but the question arising whether the deed dated 16 May, 1722, and the fine levied pursuant thereto were not a revocation of the said will, whereupon his lordship referred it to the judges of his majesty's court of B. R. at Westminster, who were desired to give their opinion, and certify to the court, whether the will of Dorothy Kirby dated 25 January, 1719. As to the devise of the lands therein contained was revoked by the deed of the 16 May, 1722, and the fine levied in pursuance thereof, and whether the said Dorothy Kirby's share of the lands contained in the said deed of 16 May, 1722. and the fine levied thereon, or any part thereof, did pass by the will of the said Dorothy Kirby?

To which question the judges returned the following opinion, (viz.)

We are of opinion that the will of the said Dorothy Kirby is not revoked by the deed dated 16 May, 1722, and the fine levied in pursuance thereof, and that the said Dorothy Kirby's share of the lands contained in the said deed of 16 May, 1722. and the fine levied thereon do pass by the will of the said Dorothy Kirby of the 25 Jan. 1719. Raymond, F. Page, E. Probyn, W. Lee.

3 Wms's Rep. 169, 170. (B) in the notes there cites S. C. and says that the Ld.

Chancellor concurred with the opinion of the judges, and ordered that the said several trusts in the said will should be established. But adds, that if A. devises lands and levies a fine, and the caption and deed of uses are before the will, but the writ of covenant is returnable after the will, this seems a revocation; because a fine operates as such from the return of the writ of covenant, and not from the caption. See Salk. 341. Lloyd v. the Lord Say and Seal. And yet this is a hard case, since by the caption the party consents to all his part, and the rest is only the act of the clerk or his attorney, without any particular instructions from the party.

31. Though a *covenant* or *articles* do not at law revoke a will, yet if entered into for a *valuable consideration*, amounting in equity to a conveyance, they must consequently be an equitable revocation of a will, or of any writing (as by a feme covert) in nature of a will. 2 Wms's Rep. (624.) Trin. 1731. by Ld. C. King, Cotton v. Laver.

32. John Stamp by will 30 Nov. 1721, devised all his real and personal estate to Howse, Froome, and Spillet, upon several trusts for charities, &c. for dissenting teachers, &c. and 7th December following by lease and release, as well for, and in consideration of the natural love and affection which he bore unto his well beloved cousins, the said Howse and Froome, and his beloved friend the said Spillet, as of 10s. John Stamp the testator conveyed all his real estate (about 160l. per ann.) to the said Howse, Froome and Spillet and their heirs, to the use of them and their heirs, with a power of revocation upon a tender of 10s. and after 11th of same December, John Stamp by a deed of sale gave all his personal estate to the same Howse, Froome, and Spillet of the value of about 11000l. reserving the interest, &c. to himself for his life, and in January following John Stamp testator died,

MS. Rep. Mich. 1734. Lloyd v. Spillet. — 3 Wms's Rep. 344. pl. 90. S. C. but not quite so full.

died, and Howse, Froome, and Spillet obtained administration (as trustees) cum testamento annexo.—By the will an annuity of 15*l.* per annum is given to the heirs at law.

*Bill by plaintiffs as heirs at law to have a conveyance of the real estate as a trust resulting to them upon supposition that the deeds were a revocation of the will, and no use, &c. sufficiently declared upon the deeds or otherwise to have two annuities of 15*l.* per annum each, and some legacies under the will, &c.*

Mr. Attorney General & al' for the plaintiffs.—This is a resulting trust, the conveyance being without consideration, &c. and cited Co. Litt. 22. 2 Vern. 571. City of London and Garraway and Randal and Hoop, Ibid. 2 Vern. and Pollen and Husband.

Solicitor General for the defendant. Here is no trust to result; the conveyance of the real estate is absolute; it is expressed to be for natural love and affection, and is to the grantees and their heirs to the use of them and their heirs; so here is no room for any implied trust at common law, and before the statute of uses a feoffment for natural love and affection would have been sufficient to carry the use as well as the legal estate; so in a covenant to stand seised, &c. Resulting trust is, where a trust is raised and but part disposed, &c. but here no trust is raised for any purpose, &c. And where a conveyance purports to be made for the benefit of A. it is contrary to the statute of frauds to say or prove it for the benefit of B. &c.

Lord Chancellor. The will begins, I John Stamp having made my eyes my overseers and my hands my executors, &c. intending by this to persuade the world that he had disposed of his whole estate in his life-time, and so to disappoint his wife of the provision he had agreed to make on her marriage and her option to take by the custom of London, and after specifying the trusts gives the trustees, Howse, Froome, and Spillet 320*l.* a piece per annum for their trouble and pains.

The will and codicil though dated 28 March 1721, yet were not executed till 30 Nov. 1721, then follows the conveyance of the real estate and the grant of the personal estate for the same consideration of natural love and affection, &c. 2 January following testator died, and then a bill brought by the widow and decreed her a moiety of the personal estate and dower.

As to the trustees, who now set up for themselves, they have acted inconsistently, they proved the will and paid the 15*l.* per annum till lately, &c. and bill is now brought by the heirs at law for a reconveyance of the real estate and for a distributive share of the personal estate. And 1st, taking of the deeds as distinct from the will they are a complete disposition of his real and personal estate. No fraud appears, and though the conveyance be voluntary and not good against creditors or the custom of London, yet it is good against the heir at law, and the consideration as to the real estate being 10*s.* money, that is sufficient to raise the use, and for love and affection, that imports a bounty, &c. and as to the personal estate, there is an interest reserved to the party for his life, &c.

And

And another thing in the conveyance of the real estate which destroys a resulting trust is the power of revocation, though the strongest is that which is made in consideration of love and affection.

But the difficulty is, that it *does not appear that testator's intent was altered, and more benefit designed by the deeds than by the will, and so all to be considered as one transaction*, but then it is objected, that the deeds make a revocation of the will, and then all results for the heir, but is not clear that this is a revocation of the trusts of the will. *The legal estate is not given to the trustees but upon a contingency if his will should be disputed.* And therefore now to complete testators intent by his will, whereas he had given his trustees his estate upon contingency only he now gives them the same absolutely. And therefore as by the will they had the equitable interest upon trust, they now have the legal interest but still for the same purpose.

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This is not like cases put of revocations, as of **PULLEN AND HUBAND**, that was a new disposition totally, so **LD. LINCOLN'S CASE**, those shewing an alteration in the intent of testator, not so here.—Obj. How comes testator if intended only to complete, &c. not to refer to his will. Answer. It is plain, testator intended to defeat his wife of her share by the custom, and therefore might think disposing by deed might bind her though mistaken.

It appears the execution of the will was but a few days before date of the deeds, and does not appear when the deeds were executed, and if at the same time with his will it would be clear without question, and holds that it was the testator's intent, the trustees should take nothing but according to his will, and their proving the will shewed their thoughts, &c. that at that time they looked upon themselves as trustees and that the will subsisted, and now they say the will is of no effect, not a legacy to be paid, &c. This while the matter was fresh in their minds, and before they had hardened themselves, and in their answer say they are to have the estate for their own use at least subject to the trusts in the will. Wherefore holds it a trust in them.

As to forfeiture by the heirs in case of controverting the will as to the legacies, &c. to them, it is given after to the trustees upon the same trusts as before and so revives them, &c. but the trustees paid the annuities and the occasion of disputing the will is from facts after the will and not upon the will itself, but this is hard for the trustees to insist upon, because they at the same time dispute the will and would put all in their own pockets.

And holds that there is no pretence for a resulting trust, the whole being disposed of, &c.

(R. 7) Revocation. In Respect of the Manner of doing it.

1. **A** S one ought to be of good and *sound memory* at the disposing, so he ought to be at the revoking; and as he ought to make a will by his own directions, and not by questions; so ought he to revoke it of himself, and *not by questions*; per Montague Ch. J. and not denied by any other. Cro. J. 497. pl. 3. Mich. 16 Jac. B. R. in case of Cranvell v. Saunders.

2. A. bequeathed his *black gelding* to B. and afterwards gives him away, or *sells him and buys another black gelding*. This new-bought horse shall not pass by the will, because it was not the testator's at the time of making the will. Wentw. Off. Executor 23.

3. If A. by will in October in one year bequeaths his *crop in the barn*, and lives to the next October 12 month and *sells that crop and ingeth another crop*, this new or latter crop shall not pass by the will, and the former cannot. Wentw. Off. Executor 23.

[152] (S.) What Act of a Stranger [shall avoid a Will. Disscisin.]

2. Le. 163. [1. **A** Stranger *disscises the devisor*; if he dies before re-entry the devise is void 39 H. 6. 18. b.]

6. 450. S. P. — Gouldsb. 111. in pl. 16. cites 39 H. 6. S. P. — *It seems it should be according to Roll 39 H. 6. 18. b. [pl. 23.] — Br. Devise, pl. 19. cites S. C. — Fitzh. Devise, pl. 27. cites S. C. but it is not S. P. nor is the point, there mentioned, in the case in the year-book.

(T.) What Act shall be a Revocation.

[Inconsistency in the Will, or devising the same Thing twice in the same Will.]

If one de- [1. **I** N a will, if there be *several devises of one thing*, the last devise vises land shall take effect. Co. Lit. 112. b.]

to J. S. in fee, and after by the same will devises that land to J. D. for life, both parts of the will shall stand; and in construction of law, the devise to J. D. shall be first.

So if a devise be to J. S. in fee, and afterwards, in the same will, the land be devised to J. D. in fee, they are jointenants; per Anderson. And Mead said, that case had been often moved, and always ruled, that the devise is good to them both, and they shall take as tenants in common, or at least as jointenants. Cro. E. 9. pl. 2. Mich. 24 and 25 Eliz. C. B. Anon.

Where land in the same will is first devised to one and afterwards to another, they shall take it between them notwithstanding my Lord Cook's opinion, that the latter clause revoked the first. Vern. 30. in pl. 25. Hill. 1681. in case of Fane v. Fane.

2. Note; It was said by Dyer and Brown justices, that if a man deviseth by his will to his son, a manor in tail, and afterwards by the same will he deviseth a third part of the same lands to another of his sons, they by this are joint-tenants. 3 Le. 11. pl. 27. Mich. 8 Eliz. in C. B. Anon.

3. And if a man in one part of his will deviseth his lands to A. in fee, and afterwards by another clause in the same will, deviseth the same to another in fee, they are joint-tenants. 3 Le. 11. pl. 27. Mich. 8 Eliz. in C. B. Anon.

(U) In what Cases the whole Estate shall be revoked, which was before devised, and where but Part.

[1. If a man seised in fee devises it to J. S. in fee, and after leases it to J. D. for years, this is not any revocation of the fee, but only during the years. Mich. 38, 39 El. B. R. between Montague and Jeffrys; agreed per Curiam and counsell.]

[2. So, if after the devise he leases it to another for life, yet this is not any revocation of the fee but only during the estate for life, for his intent does not appear further than only during this estate. Mich. 38, 39 El. B. R. between Montague and Jeffrys; agreed per Curiam.]

[3. [So] if a husband possessed of a term for 40 years devises it to his wife, and after leases the land to another for 20 years and dies; this lease is not any revocation of the whole estate, but only during the 20 years, and the wife shall have the residue by the devise. 26 El. B. Wilcox's case of rent, by Gaudy.]

[4. If a man devises Black-acre to J. S. in fee, and after upon marriage between him and A. covenants to make a feoffment of the said Black-acre, and of other land in fee to the use of himself + for life, the remainder to his new wife for life, the remainder to his own right heirs, and after * makes a feoffment accordingly, by which this is a revocation of the will as to the estate for life of the feme, yet this is not any revocation as to the fee notwithstanding he made the feoffment in fee to the feoffees, and limited the remainder to his own right heirs, for this is only his old reversion without any alteration. M. 38, 39 El. B. R. between Mountague and Jeffrys, per curiam agreed; but it seems this is not law, for his intent appears to have it by the new limitation which revokes the will. Dubitatur, P. 41 El. B. R. same case.]

5. A. by will devised to B. in fee, and afterwards by indenture makes a lease for years of the same lands. This lease if not made to the same person, shall be a revocation pro tanto only, even at law. Cro. J. 49. pl. 20. Mich. 2 Jac. C. B. Coke v. Bullock.

6. A mortgage for years of lands devised in fee is a revocation pro tanto only. Chan. cases 193. Hill. 22 & 23 Car. 2. Barber v. Took and Lindsey.

C. Jeffries affirmed the same, and declared, that though such mortgage was a revocation at law, yet in equity it should not be taken for a total revocation, but the devise should be admitted to the

+ This in the original is (in fee) but seems misprinted.

* Fol. 617.

See (Q.) pl. 2. S. C. and the notes there.

S. C. cited by Ld. Keeper. 2 Vern. 496. Faich. 1705.

And upon an appeal from this decree Ld.

the redemption; for the intent of the mortgagor's making the mortgage, could be no other than only to serve his special purpose of borrowing money to supply his present occasions. Vern. 342. Mich. 1685. Hall v. Dunch.—S. C. cited by Sir Joseph Jekyl master of the rolls, and said that the reason is equally applicable to mortgages in fee, or for years.—And cited also Show Parl. Cases 156. *Ld. Lincoln v. Roll*, where it was admitted by counsel of both sides, that a mortgage in fee was not a revocation of a devise, because (as the counsel of the appellant said) in equity the mortgage makes not the estate another's (and as the counsel of the respondent said) because a mortgage is not an inheritance, but a personal estate. 4 Wms's Rep. 649. Hill. 1732 in case of Sutton v. Sutton.

But if the mortgage is to the devise, it is a revocation in toto, but otherwise had it been to a stranger; per *Ld. Macclesfield*. Ch. Prec. 514. *Harkness v. Baily*.

A mortgage by lease and release and fine, is only a revocation of a will devising the same lands pro tanto. Per *Ld. C. King*. 2 Wms's 329. 334. Hill. 1725. *Rider v. Wager*.—A mortgage subsequent to a devise is no revocation, but pro tanto only. 2 Vern. 496. cited by *Ld. Keeper*. Pasch. 1705. as the case of Hall v. Dunch.—Vern. 329. pl. 325. Trin. 1. Jac. 2. S. C. at the Rolls held accordingly.—S. C. cited by lords commissioners. Mich. 1691. 2 Freem. Rep. 117. pl. 133.—*Ibid*. 203. pl. 277. Pasch. 1695. cites S. C.

The reason why a mortgage, even in fee, is not a revocation, is, because the mortgage does carry upon the face of it a defeasance, and it is not reckoned an inheritance to the heir of the mortgagee, but shall be personal estate and assets to pay the mortgagee's debts. Arg. Show. Parl. cases 156. in case of *Lord Lincoln v. Roll*.—And because mortgages are not considered as conveyances of, but only as charges upon, the estate. Abr. Equ. cases 412. Trin. 1695. S. C.

7. A mortgage was made after a voluntary settlement, with a power of revocation and a will in confirmation of such settlement. The mortgage is a revocation pro tanto only. Vern 97. pl. 84. Mich. 1682. *Perkins v. Walker*.

[154] 8. A will attested by three witnesses, being of a real and personal estate may be revoked by a writing, being a draught of a will only, signed by the testator without any witness as to the personal estate, and such draught is a good will to dispose of the personal estate, and such legatees of the personalities in the first will as are left out in the second will must lose their legacies, but such as had legacies by the first will, chargeable on the real estate, if the same legacies were devised to them by the second will, they shall still continue chargeable on the real estate, and shall be raised out of it. And so it shall be whether the legacies be increased or diminished, they being by the second will made chargeable upon, and to be raised out of, the real estate likewise, which though not sufficient in itself to charge the real estate, yet since the real estate remained well devised by the first will, they should be still secured by that real estate which was well devised; but for other new absolute personal legacies they shall be chargeable only on the personal estate, but shall be the first payable out of it, because the other have the real estate for their fund. Per *Cowper C.* 3 Ch. R. 160. 6 Annæ. *Hyde v. Hyde*.

9. Where at the time of the making a will there are mortgages to the testator if the equity of redemption be afterwards bought in or foreclosed, yet they cannot pass without a republication, that being a revocation pro tanto. 3 Ch. R. 188. Trin. 7 Ann. *Litton alias Strode v. Falkland*.

10. A. devised three acres of land to trustees to permit B. his daughter to receive the rents till she marries or dies, and if she marries with consent of the trustees and mother, then to convey to her and her heirs. B. marries in A's life, who settles two of the acres on B. and her husband and dies; per *Cowper C.* this is no revocation

as to the other acre. 2 Vern. 720. pl. 639. Mich. 1716. *Clerke v. Berkeley.*

11. Mr. Bohun having four daughters A. B. C. and D. makes his will in 1705, and thereby devises several parcels of his estates severally to his four daughters, & int' al. he devises to trustees *all his lands, tenements and hereditaments in B. and F. or either of them, or near thereto adjoining, in trust for his daughter A. until her marriage or death, and in case she marries with the consent of her trustees then for her and her heirs, or for such person as she shall appoint, &c. But in case she should marry without consent of her trustees, and forfeit her estate, then to her other sisters equally between them, &c.* Afterwards in 1708 the plaintiff Clerk marries A. with the consent and approbation of her father Mr. Bohun, and he settles upon the marriage (his wife joining with him, who had these lands in jointure) part of these lands devised to her by his will after the death of her mother, and also 7 l. per ann. *fee farm rent*, which was doubtful if it passed by the will or not.

Afterwards in 1709, Mr. Bohun the father dies without altering the will.

Note, Mr. Bohun in a letter to Mr. Clerk upon the treaty of marriage, declares, what he will give with his daughter in present, and that she will be a better fortune at his death.

1st. *Quære*, if this devise to his daughter A. in fee upon condition of marrying with the consent of the trustees be dispensed with, or performed by her marrying in her father's life-time, and with his consent?

2d. *Quære*, if the father giving and settling upon his daughter A's marriage part of the lands devised to her by the will precedent to the marriage be a revocation of the whole devise to her, or only pro tanto, as was settled on her upon the marriage?

It was argued for the defendant, that this was a condition precedent, and till performance the estate cannot vest, that it was not performed by her marrying with her father's consent, that conditions precedent are not aided by a court of equity but must be strictly performed before the estate will vest either in law or equity, and to this purpose the cases of *FRY AND PORTER* in *Vent.* and *BERTY AND LORD FAUKLAND* in *Dom. Proc.* were cited.

As to the second point they argued, that this settlement of part of the lands devised to her by her father upon the marriage, and the 7 l. per ann. *fee farm rent*, (which they insisted was not included in the devise to her) was a revocation of the whole devise to her. There are two sorts of revocations, viz. *expressed and implied*. *Implied* is either where the testator does some act subsequent to the devise, which is inconsistent with, and renders the devise impossible to take effect, or where the testator does some act which apparently shews his mind to be altered since the making the will, and that this case comes within the last of these rules, for at the time of making the will, Mr. Bohun considered his daughter A. as a child wholly unprovided for, and gives her these lands as her whole provision, and as to a child who never had any portion from him, and therefore at the time of making his will, A. was to be considered in a different

2 Vern. 720. pl. 639. Mich. 1716. *Clerke v. Berkeley & al. S. C.* decreed accordingly, and as to the having the consent of the trustees and her mother, that was dispensed with by having the testator's own consent, which was more to be regarded than any consent of trustees, to whom he had delegated a power to consent in case of a marriage after his decease.

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view from what she was at the time of his death, when she was married and had received a portion, and it cannot be supposed that a father would make the same provision for a married daughter who has had a portion, as for a maiden daughter who never had any thing from him.

They admitted that her marrying with her father's consent in his life-time, cannot be a forfeiture so as to vest the estate in the devisees over, but the estate will descend as undisposed of, and so she come in as one of the co-heirs to her father, for a fourth part.

But it was insisted on for the plaintiff, 1st. That by the marriage in the life-time of the father, and with his consent, the condition in the will was dispensed with by the act of the father, who did annex the condition to the devise, or else the condition was performed in substance by the marriage with the father's consent, and where the substantial part and intent of the condition is performed, equity will supply the defect of circumstances, and so one way or other the estate did vest by the devise.

As to the second point it was insisted that the lands given by the father in his life-time with his daughter in marriage, though after the will made was not a revocation of the whole devise to her, but only for so much thereof as was settled by the father upon her marriage. When Mr. Bohun made his will, he took into consideration the whole affairs of his family, viz. the number of his children, and the quantity and parts of his estate, and allotted such proportions to each child as he thought proper. He lived a year after A's marriage, and if he had designed that his daughter A. should have no more of his estate than what he gave with her in marriage, in all probability in all that time he would have altered his will accordingly, which is a strong presumption that his mind continued, that his daughter A. should have all the lands devised to her by the will, and his giving her part of them in his life-time, is no argument why she should not have the rest at his death according to the will.

Suppose a father by his will gives his daughter 10000l. and afterwards marries her and gives her 5000l. for her portion, and then dies without revoking his will, this is clearly not a revocation of the whole devise of 10000l. but only revocation or satisfaction pro tanto, viz. 5000l. and she shall take the other 5000l. by the will, this is a plain case, and the same in reason as the present case.

[156] Cowper C. was of opinion, that by the marriage with the consent of her father the condition is dispensed with, and the devise becomes absolute; for conditions of this kind, be they conditions precedent or subsequent, are in nature of penalties and forfeitures, and if the substantial part and intent be performed, equity should supply small defects and favour the devisee. It is admitted here is no forfeiture, and shall I take away the estate from the first devisee, when it cannot go to the devisee over, only to let it descend to the heirs at law, which certainly was never the intent of the testator.

As

As to the second point, he held that the lands settled by the father upon the marriage of his daughter A. is a revocation only pro tanto of the lands devised to her, and not of the whole devise; for implied revocations ought to be plain and certain, and the inconsistency most apparent, which is not so in this case; for why may not the father give his daughter all these lands at his death, though it was not proper for him to part with them all in his lifetime, though he gave part by deed, why may he not give her the rest by will?

Decree for the plaintiff the wife for all the lands devised to her by the will. MS. Rep. Mich. 3 Geo. in Canc. Clerk & Ux' v. Lucy & al'.

12. A. devised his estate to four in trust, and afterwards by a codicil he revoked the part of his will, whereby he made two of the four trustees, and named two others in their room, this is no revocation of the other dispositions in his will. 9 Mod. 68. Mich. 10 Geo. Acherley v. Vernon.

(X) In what Case Revocation of Part of the Estate shall be of the Whole.

[1.] *If a man commands another to write his will, and thereby give to his wife an estate for life in his manor of D. and he writes it, that he gives it her for life, upon condition that she shall not marry, and this condition being shewed to the deviser, he disallows it, yet by this the estate is not revoked, but only the condition.* Sir Richard Pexhall's case cited, Mich. 38, 39 El. B. R. per Popham.]

Cro. E. 100. in pl. 3. S. C. cited Arg. that the testator died before the will was altered, and that it

was ruled in chancery, that the proviso was void, and the rest of the will stood good. — D. 72. 2. marg. pl. 2. cites S. C. that the condition is void because countermanded by parol. — 8 Rep. 83. b. Sir Richard Pexhall's case is a different point.

(Y) Where by Revocation of Part [of the Things devised] all the Things, or Part only, shall be said to be revoked.

[1.] *If a man devises three manors to J. S. and after he says, that the devisee shall not have the manor of D. which is one of the three, yet this shall not be any revocation of the will for the other two manors.* M. 38, 39 El. B. R. per Popham.]

2. *Devise of a term carved out of an inheritance for 99 years before the statute of 3 & 4 W. & M. cap. 14. of fraudulent devises in trust to pay 14l. per annum to his grand daughter for life, and after the making this will the deviser mortgaged this land to another for 500 years, (which is a revocation in law of the devise for the term,*

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but the devisee has an equity to redeem the mortgage) the mortgagee assigns over the mortgage to the plaintiff, who was a creditor by bond to the testator, and the reversion in fee descended to the heir at law of the testator. The question was, If the devisee of the annuity shall redeem the mortgage without paying the debt due by bond to the assignee of the mortgagee? Per Cowper C. the mortgage in this case is a revocation pro tanto of the devise of the annuity, and she must keep down the interest, or pay a third part of the redemption, but being a devisee, she may redeem the mortgage without paying the bond. MS. Rep. Pasch. 2 Geo. in Canc. Saunders v. Hawkins.

(Y. 2) Revocation. By Satisfaction, Gift, &c.

The same of an agreement before the will made. N. Ch. R. 38. 15 Car. 1. Willoughby v. Earl of Rutland.

1. **DEVISE** by will, and *an agreement after the will made about a portion*, and that it was to be in full of what was intended by the will, ought not to be construed as several sums. Decreed by the Master of the Rolls, and affirmed by Ld. K. Bridgman. 2 Chan. Rep. 35. 21 Car. 2 Hale v. Action.

2. *A. makes B. his brother executor by his will, and gives him all his real and personal estate, and afterwards marrying, by a codicil makes C. his wife executor, C. shall have the personal estate, and not B.* Vern. 23. pl. 36. Mich. 1681. Wilkinson v. —

S. P. Arg. and seems to be admitted by Ld. C. King. 2 Wms's Rep. 333, 334. Hill. 1725. in case of Rider v.

3. *A. devised to his daughter two hundred pounds. Item, I also give her my household goods, if she shall not be married in my life-time; afterwards he gives with her in marriage above two hundred pounds and dies, having neither revoked or altered his will; per Commissioners, the legacy is extinguished by the portion after given, and ELKENHEAD'S CASE was cited, where payment in the testator's life-time was adjudged a satisfaction of the like sum devised.* 2 Vern. R. 115. Mich. 1689. Jenkins v. Powell.

Wager. — *A. had three daughters B. C. and D. and devised to B. 1000l. and after in the same will devised to B. C. and D. 1500l. a-piece for their portions, and charged the last sums on land in S. B. marries in A's life-time, and A. gave B. 4000l. portion; per Ld. Wright, this 4000l. is a satisfaction of the 1500l. given B. in the will for her portion, and a revocation of the will pro tanto, but the 1000l. being a general legacy given, B. must have it, notwithstanding the 4000l. given her for her portion.* Ch. Prec. 182. Hill. 1701. Ward v. Lant.

S. C. cited 2 Vern. 115.

4. *A. by will devised 1000l. a-piece to five daughters, and after legacies paid, gave the surplus of his lands equally among his five daughters, and gave one thousand pounds portion with one of them in marriage, she was excluded from the one thousand pounds intended by the will.* 2 Vern. R. 257. Hill. 1691, in case of Jeffson v. Jeffson, cited per Cur. as the case of Elkenhead.

5. *The defendant's testator by his will gave his 4 daughters 600l. a-piece, and afterwards married his eldest daughter to the plaintiff, and gave her 700l. portion; after that he makes a codicil, and gives 100l. a-piece to his unmarried daughters, and thereby ratifies*

ratifies and confirms his will and dies, and the plaintiff preferred his bill for the legacy of 600 l. given to his wife by the said will; and the only question was, whether the portion given by the testator in his life-time should be *intended in satisfaction of the legacy? And held that it should; and agreed to be the constant rule of this court, that where a legacy was given to a child, who, afterwards upon marriage or otherwise, had the like or a greater sum, it should be intended in satisfaction of the legacy, unless the testator should declare his intent to be otherwise; and it was said *the words of ratifying and confirming do not alter the case*, though they amount to a new publication, being only words of form, and declare nothing of the testator's intent in this matter. 2 Freem. Rep. 224. pl. 295. Mich. 1698. Irod v. Hurst.

6. A. by will gave 750 l. to C. his younger son, and afterwards buys him a cornet's commission for 650 l. and it was proved he intended to strike so much out of his will as soon as the accounts came from London, but he died before they came without altering his will. Decreed that this shall go in diminution of the legacy, and be taken in satisfaction of so much. Ch. Prec. 263. Mich. 1706. Hoskins v. Hoskins.

7. A. by will made in 1700 devised 50 l. to the wife of B. and afterwards in 1701 gave B. a note for 50 l. payable on demand. It was proved that the note was intended a satisfaction of the legacy. It was objected that the note and legacy were to different persons, one to the wife, the other to the husband, and if he had died the wife should have had the legacy, and B's executors the note. Per Master of the Rolls, it is a testamentary question, and evidence may be received; and dismissed the bill. 2 Vern. 646. pl. 575. Hill. 1709. Chapman v. Salt.

8. A. by a will gave legacies to his children, and to his eldest son 2000 l. afterwards he sends him to Italy and lets him have 400 l. and being a merchant, enters on the debtor-side of his book, my son debtor 400 l. upon a computation afterwards of his estate, and finding it deficient, retrenches by codicil 400 l. out of each of the other's legacies, without taking any notice of the eldest son or his 400 l. The Master of the Rolls decreed the whole 2000 l. Ch. Prec. 298. Trin. 1710. Bird v. Hooper.

9. A. by will gave 300 l. to his daughter, provided she married with her mother's consent, if not, only 200 l. afterwards in the life-time of the father and mother; she married without consent of either. He afterwards gave her 200 l. and died without altering his will. Ld. Macclesfield this a satisfaction of the legacy and so a revocation of the will as to that portion. Ch. Prec. 541. Mich. 1720. Hartop v. Whitmore.

The case is stated that A. by will devised to his daughter 300 l. and that afterwards he married

her to J. S. and gave her 300 l. in marriage, and lived four years after without revoking his will. After the father's death the husband became bankrupt, and the assignees brought a bill against the executor of the father for the 300 l. or to have, at least, the 200 l. residue. But Ld. C. Parker held that giving a daughter a portion by will, and after giving her a portion in marriage, is by the law of all other nations, as well as of Great Britain, a revocation of the portion given by the will, and that by giving the portion the will was so sufficiently revoked, that any other act of revocation would be revoking it twice, and dismissed the bill with costs. Wms's Rep. 681. Mich. 1720. Hartop v. Whitmore.

10. Bill by the plaintiff and Ux'. against the defendants, executors of Mrs. Tryon, to have a satisfaction for a note of 500 l. and also for a legacy of 1000 l. given to the plaintiff's wife.

Mrs Tryon having three daughters (Ann the plaintiff's wife, E. and M.) made her will and thereby devised 1000 l. to Ann, 800 l. to E. and 500 l. to M. &c. After this will was made, the plaintiff Mr. Pepper made his addressees to Ann, and upon a treaty of marriage Mrs. Tryon gave a note for 500 l. payable within six months after marriage to Mr. Pepper, in augmentation of her daughter's portion left her by her father, and the next day the marriage was had, and upon the marriage day Mrs. Tryon, the mother, was taken ill and died six days after of that illness, without altering or making a new will, but she did declare, that she did intend that her daughter Ann should have but 1000 l. from her, and that now since she had given her this 500 l. she must alter her will, and sent for an attorney to do it, but when he came she was light-headed and died soon after, and it was said by the defendants the executors, that the assets of the testatrix were not sufficient to pay the plaintiff the 500 l. upon the note and the 1000 l. legacy, and likewise the legacies left to the two other daughters, and two points were made in the case, scilicet.

1st, If this 500 l. note shall be taken in part of satisfaction of the legacy of 1000 l. 2dly, If parol evidence shall be admitted to prove the intent of the testatrix, and in this case?

Mr. Vernon for the plaintiff insisted, that the plaintiff was well intitled to the 500 l. upon the note, and also to the legacy of 1000 l. and that this case did not come within the rules of constructive or implied satisfaction in a court of equity; that here the legacy would not be satisfaction for the debt due by note, because the note was given after the will made, and consequently could not be the intention of the testatrix to discharge the debt by the legacy which was not then in being, and so it has often been held in this court. 2dly, As to the parol evidence that ought not to be admitted to explain the meaning and intent of testatrix, the will being in writing, and the words plain and certain, and cited the case of *LITTON v. FALKLAND* in Canc. and afterwards in Dom. Proc.

Mr. Mead contra. Admitting that the legacy of 1000 l. cannot be taken as a satisfaction for the note of 500 l. yet the note may be construed as a satisfaction pro tanto of the legacy, if the party intended it to be so, and cited the case of *CALMADY v. CALMADY* in Canc. The father by will gives his daughter 1500 l. for her portion, and afterwards upon the marriage of his daughter gave her 1500 l. and died soon after without altering his will. This 1500 l. portion given by the father in his life-time was held as a satisfaction for the legacy.

As to the parol evidence, he said it was not offered to controul or explain the will in writing, but to prove the intention and meaning of Mrs. Tryon's giving the note that she meant it to be in part of the 1000 l. devised by the will, and that she died before she could alter the will, as she designed, &c.

Parker

For the evidence being real, were cited the cases of *Doxie* and

Parker C. Circumstances of the testatrix and her family may be given in evidence to expound the will, but not any parol declarations to explain the words of the will, or controul it; that in this case there is no doubt upon the words of the will, but the question is, if the testatrix has not advanced part of the legacy in her lifetime upon the marriage of her daughter, and the evidence is only as to the satisfaction, and thereupon admitted the evidence to be read.

Doxie, and Littlebury and Buckley, in Dom. Proc.

Master to see if assets sufficient to pay all the legacies and upon report the court to determine as to the quantum due to the Plaintiff. MS. Rep. Hill. 9 Geo. Can. Pepper & Ux'. v. Wineve & al'.

10. Mr. Lannoy, on his marriage with Mr. Frederick's daughter, settled 500 l. per annum on her; he after surrendered some copyhold estates to the use of his will which he made, and gave the copyhold to his wife; Mr. Lannoy after levied a fine, and made a new settlement, and increased her jointure 300 l. per annum, but never altered his will. Ld. Chancellor. The settlement is a revocation of the will, for such lands are comprised; but the copyhold is not, and therefore passes by the will. Sel. Cases in Ld. King's time, 48, 49. Trin. 11 Geo. Lannoy v. Lannoy.

11. A person obliged to lay out trust-money to be settled on herself for life, remainder to the heirs of A. buys lands not of the value of the trust-money, and devises those lands to B. who is heir at law to A. and also her own right heir, and gives several legacies which could not be paid if the devise were not to be taken as part of satisfaction; and for that reason so decreed. Sel. Cases in Canc. in Ld. King's time, 63. Mich. 12 Geo. Gibson v. Scudamore.

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(Y. 3) Will. Revocation. By presumption.

1. **UPON** an appeal before sentence to the delegates it was adjudged, that if a man makes his will and disposes of his personal estate amongst his relations, and afterwards hath children and dies, that this is a revocation of his will according to the notion of the civilians, this being an *inofficiosum testamentum*. 2 Show. 242. pl. 240. Mich. 34 Car. 2. B. R. Overbury v. Overbury.

2. One made his will and appointed J. S. a stranger executor, afterwards he went beyond sea, and being governor of the plantations sent over for an English woman of his acquaintance, whom he married and had children by, and died without any actual revocation of his will; yet this total alteration of the testator's circumstances was held an implied revocation. Wms's Rep. 304. mentions it as a case cited by Sir John Trevor, which he said he remembered to have been adjudged. And the reporter in a note there mentions it to be the case of Eyre v. Eyre.

S. C. cited Abr. Equ. Cases 413. as Ayres's case.

3. A. made a will and devised lands to B. charged with legacies to W. R. and J. S. afterwards A. married and had children and died.

* The lands were devised to a

feme whom the testator afterwards married, and who died, leaving her privement enfeint of a son, which son would be heir to the mother as well as to the testator;

so that Ld. Keeper thought this no such alteration of circumstances; for that no injury is done to any person; and those are provided for whom the testator was most bound to provide for; and so he established this will. Abr. Equ. Cases. Trin. 1702. Brown v. Thompson.

The legatees brought a bill for their legacies; but Sir J. Trevor held, that the marriage and having children was a revocation of a will of land and dismissed the bill. Wms's Rep. 304. in a note there says, this was adjudged 8 December 1701. Brown v. Thompson. But the reporter adds, that he finds indeed in the register book, that Ld. Keeper Wright in July following reversed the order of dismissal, and decreed payment of the legacies; but that in the abridgment of cases in equity, p. 413. it is said that it was *on the particular circumstances of the case*, and that he allowed the statute of frauds and perjuries did not extend to an implied revocation.

4. In case of *great enmity arising* and unreconciled between testator and legatee, it seems to be of the nature of a revocation implied or presumed. But there may be a *diversity where testator dies shortly after*, and before he comes to the place where his will is so as he has no opportunity of altering the bequest; and where he *lives long afterwards and comes to the place where the will is* and peruses it, yet makes no alteration. Went. Off. Ex. 242.

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(Z) New Publication.

*Br.Devise, [1.] If a man devises certain lands, and after *aliens* the land to a stranger, and *repurchases* and after *shews his intent that the said will shall be his will*, this is a new publication, and the land shall pass by the devise. * 44 E. 3. 33. 2 R. 3. 3.] it seems there that the alienation and re-taking shall not defeat the will made before; for this is not his will till he dies.

Bendl. 131. [2. If a man had *devised an use before the statute of 27 H. 8.* which devise was revoked by the said statute, because the use was transferred into the possession, yet if *after the 32 H. 8.* of devises he had *allowed the said will without new writing*, this had been a new publication, and the land had passed by the will. D. 3. 4. Ma. 123. 56. [Putbury v. Trevillian.]]
pl. 192. Trevillian v. White.
S. C. adjudged a good will.
—And. 7. pl. 14. S. C. adjudged.

D. 142. b. [3. If a man *devises a term* of which he is possessed and after *mortgages the term* and after *performs the condition*, and enters, and dies, it seems the devise is void. Contra, M. 40, 41 Eliz. B. R.]
Marg. pl. 55. cites Mich. 40 and 41 Eliz. B. R.
Hewitt's Case. Devisee shall have the residue.

Mo. 289. pl. 1000. 2 Jac. S. C. adjudged that [4. If a man *devises lands* to another, and after *makes a scoffment to the use of his will*, though this be a revocation of the will, yet the *reference of the scoffment to the will* makes it a new publication

lication of the will. Huffy's case adjudged, cited by Will. H. 4. the feoffment was a revocation
Jac. B. R. in Fretchevill's case.]

of the will, and yet the countermanded will was sufficient to declare the uses of the feoffment; adjudged.——Ow. 76. 28 Eliz. C. B. Gibson v. Mutels S. P.——Gouldsb. 32. pl. 7. Gibson v. Platleis S. C. and S. P.

[5. If a man devises lands in fee to J. S. and after makes a feoffment thereof to a stranger, to the use of himself for life, the remainder to his wife for life, the remainder to his own right heirs, and by the same will makes his daughter executrix, admitting that this is a revocation of the will for the fee, if after the deviser adds, and inserts these words in the will with his own hands, scilicet *I make my wife and my daughter my executors of this my last will and testament*; and also for his supervisor before-named, who was dead, he puts in *and interlines another to be * his supervisor*, and also gives and inserts a new legacy to his wife, it seems that this is not any new publication of the will for the lands, for the making of a new executor, and giving a legacy, does not touch the lands, nor shew any intent that this should be a will for his lands, but for his goods. Dubitatur. M. 38, 39 El. B. R. between Mountague and Jeffrys. P. 41 El. B. R. same case.]

Mo. 429. pl. 599. S. C. the court thought it a countermand for the whole, but they doubted as to the publication. —Godop.

Fol. 618.

57. say that the writing the name of another

executor in this will, after livery, is a new publication of the will, and shall pass the last, but cites the case of Mo. pl. 599. which see supra——S. C. cited Arg. Freem. Rep. 264 in pl. 287. Mich. 1679. but the court observed that this case was not resolved, but is entered in roll with a dubitatur.

[6. If a man seised of lands devises all his lands to J. S. and after purchases the manor of D. and after writes in his will, that J. D. shall be his executor, yet this is not any new publication to make the lands pass. M. 38, 39 El. B. R. per Popham.] [62]

[7. But if after the purchase of the manor of D. he delivers the first will as his will, and says, that it shall be his will without putting any words thereto, yet this is a new publication to make the lands newly purchased to pass. M. 38, 39 Eliz. B. R. Dubitatur.]

[8. If a man seised of land in D. devises to another by his will in writing all his lands in D. and after purchases other lands in D. and after one J. S. comes to him, and requests him to give him the buying of the land last purchased, and he answers him that he will not, but that his intent was that these lands should go to his executors (for the devisee was made executor by the will) as his other lands should, and after the deviser causes a codicil to be writ, in which there is a devise of several personal things, as corn, and implements of household, and annexes it to his first will, and after dies, without other publication, yet this shall be a sufficient publication to make the lands newly purchased to pass by the will, for there needs no other words in the will than there were before, and his intent appears that it should be his will by the annexing the codicil. M. 38, 39 El. B. R. between Beckford and Parnacoll adjudged.]

fo. E. 493. 11. Beckford v. arnecott. S. C. all the justices (absente Gawly) held this a new publication of his will, and sufficient by the words to J. S. and Fenner held that the annexing the codicil there-

to is a new publication: for therein he affirmed that it should be his will at that time; but the other justices doubted thereof, because he does not thereby shew any intent that his will should be for his purchased land, nor that he then remembered it.——Mo. 404. pl. 44. Beckford v.

Parnacoll

Parncott S. C. adjodged by three justices, but Gawdy doubted.——Goulds. 150. pl. 77. S. C. but no judgment.——D. 143. a. marg. pl. 55. cites S. C. as adjudged, and says the main reason by Fenner, Clench, and Popham, contra Gawdy, was, that this annexing of the codicil amounted to a new publication.——2 Lev. 244. S. C. cited per Cur. that by republishing the will all passed, because the words in the will were sufficient.

Mo. 353. pl. 476. S. C. and the court was divided. The reporter says, *ideo quare*, and says the reason given was because the last publication was not in writing; and the others thought that there was enough before in writing to make the issue to have the land, but there they shall take by descent, whereas now they are to take by purchase.

9. A man has issue four sons, viz. A. B. C. and D. and devises lands to B. and the heirs of his body, and after his death without issue to C. in tail, and then to A. in tail, the remainder to the right heirs of the devisor. B. dies having issue F. and W. Afterwards the devisor said, *my will is, that the sons of B. should have the lands devised to their father, as they should if their father had lived and died after me.* The devisor died, F. entered, A. the eldest entered; whether if this amounted to a new publication, so as to intitle the eldest son of B. the court was divided. Cro. E. 422. pl. 20. Mich. 37 & 38 Eliz. B. R. Fuller v. Fuller.

2 Chan. Rep. 138. 140. 30 Car. 1. S. C. the point of republication was referred by the court of chancery to a trial at law, and a special verdict by Ld. Ch. Justice North directed was found, and on a solemn

10. A. being seised of several lands in D. makes his will, and devises his lands in D. and all other his lands and tenements whatsoever unto his wife, and after purchases other lands; and then discoursing with B. B. desired him to let him have those new purchased lands at the rate that he bought them; and he answered no, for that he had made his will and settled his estate, and intended that his wife should have his whole estate. The court inclined strongly that this was a new publication and applied particularly to the lands; and it is no matter for alledging quod dixit animo testandi, for that must necessarily be intended when the discourse hath particular reference to the will; and they said, that the case in 1 Roll 618. of a new executor made was not resolved; but in the book it is entered with a dubitatur. Freem. Rep. 264, 265. pl. 287. Mich. 1679. C. B. Cotton v. Cotton.

argued before all the judges of C. B. they unanimously gave judgment for the defendant that the land in question did not belong to the heir, but to the devisee by the said will.——S. C. cited 2 Ern. 209. as tried before Ld. Ch. J. North in C. B. But the point there mentioned is, that the testator saying his will was in a box in his study, amounted to a new publication.

*[16]

11. Testator's saying, *my will is in the hands of J. S. shall stand*, amounts to a good republication. Resolved per tot. Cur. in a trial at bar on an issue directed out of chancery. 2 Show. 48. 31 Car. 2. B. R. Anon.

12. A republication is good where a man gives all his lands to J. S. and then purchases other lands, and then republished his will; because there if he should write it over again he would use the same words, but where he would have expressed it otherwise if he had wrote it de novo the republication will not pass the lands; per Scroggs Ch. J. to which Jones J. agreed accordingly. 2 Show. 63. Trin. 31 Car. 2. B. R. in case of Stead v. Berrier.

2 Vent. 341. S. C. adjudged accordingly, and judg-

13. The testator had a son and grandson, both named R. and he devised his lands to his son R. in fee, and gave a legacy to his grandson R. but R. the son dying in the life-time of the testator he now published his will, and declared that his intention was, that R. the grandson

grandson should take by the will instead of R. his father; it was objected that this new publication of the will by parol could not alter the words of the written will, so as to put a new sense on them; for son and grandson are different names of appellation, and signify distinct persons; but three judges were of opinion, that the word son in the will is applicable to the grandson, for he is a son, and more; but this judgment was reversed on a writ of error in B. R. for that no parol declaration can carry the lands to one person, where by the words of the will in writing they are expressly devised to another, as in this case they were to the son; and the testator himself had in this very will distinguished between the son and grandson, for he gave his lands to one and a legacy to the other, so that this new publication and parol declaration can never make the word grandson signify son in the written will. 2 Jo. 135. Hill. 31 & 32 Car. 2. B. R. Stead v. Berrier. was adjourned.—2 Mod. 213. S. C. three justices in C. B. were of opinion for the grandson against the heir at law; but in error brought in B. R. this judgment was reversed.—3 Keb. 845. pl. 12. S. C. in B. R. adjournatur.—Pollexf. 546. Berrier v. Stead. S. C. in B. R. and observes that judgment was given in C. B. by three justices, contra Scroggs, and in B. R. judgment was reversed by the opinion of Scroggs, Jones and Pemberton, contra Dolben; so that upon the whole matter there are four judges against three, and the judgment of the three stand.—Freem. Rep. 292. S. C. in C. B. adjudged that the grandson take by the devise, contra opinionem Scroggs.—Ibid. 477. pl. 655. S. C. in B. R. adjournatur.—2 Show. 63. pl. 49. S. C. in B. R. and judgment in C. B. reversed.

ment in C. B. reversed. —2 Lev. 241. Strode v. Berenger. S. C. The reporter says he heard that the judgment was reversed.—Mod. 267. pl. 19. Stead v. Berrier. S. C. the court differed, and the cause

14. New publication of a will is favoured in equity, and a slender evidence will serve the turn; per Churchill Master of the Rolls. Vern. 330. Trin. 1685. Hall v. Dunch.

15. One makes his will, signs it, and declares it in the presence of three witnesses, and then makes a *seoffment in fee*, or does other act which amounts to a revocation, and then *new publishes his will in the presence of one or two witnesses*, this may be good enough. Quere, per Pollexfen. Skin. 227. Hill. 36 & 37 Car. 2 B. R. Anon.

16. A man at full age declared in the presence of several witnesses, that his will made when under age should stand; per Holloway and Allibon the will is void by reason of the first publication, and the latter publication will not make it good, because it wants the circumstances required by the statute of frauds and perjuries, which will never make any retrospect. And judgment accordingly nisi, &c. Comb. 84. Pasch. 4 Jac. 2. B. R. Hawe v. Burton.

17. Though a *surrender of a lease* is a revocation of the devise of a term granted by that lease in law, yet the *annexing of codicils* will amount to a new publication of that will, and decreed accordingly. N. Ch. R. 162. Hill. 1689. Alford v. Earle.

2 Vern. 209. S. C. but no judgment.—S. C. cited 3 Wms's

Rep. 168. by the name of Alford v. Alford, and that in 2 Vern. the point is not determined; but says that upon looking farther into the case, and searching the register's book, it appears to have been ruled by the court, that the codicil being annexed to the will was a re-publication of the will, if the renewal of the lease had been a revocation.

18. Republication will pass lands purchased after the will made and before the republication. 1 Salk. 238. pl. 16. Mich. 6 Ann. B. R. Bunter v. Coke.

But since the statute this must be in writing.

9 Mod. 78. Acherley v. Vernor.—And must have all necessary incidents. Per Holt Ch. J. Gibb. 229. in case of Bunter v. Coke.

19. If an *infant makes a will* and devises lands, and after full age republishes the will, the lands pass. 1 Salk. 238. pl. 16. Mich. 6 Ann. B. R. in case of *Bunter v. Coke*.

20. So of a *feme covert*. 1 Salk. 238. pl. 16. Mich. 6 Ann. B. R. in case of *Bunter v. Coke*.

21. So of a *lunatick*; per Holt Ch. J. in delivering the opinion of the court. Holt's Rep. 246. pl. 13, in case of *Bronker v. Coke*. S. C.

Since the statute of frauds the same forms are necessary to the republishing a will as to the first making. Resolved; per Ld. Cooper, Trevor and Tracy. 10 Mod. 98. in Ld. Lansdown's case.

22. J. Earl of Bath, by his will *October 11, 1684*, only executed, took notice that his lands were settled upon his son Charles and John in tail male, and then devised in these words; in case my sons shall have no issue male, then for the preservation of my name and family, I devise my said lands unto my brother Bernard Granville, and the heirs males of his body issuing. B. G. died in the life of the testator, having issue George then Lord Lansdown, by which the devise to B. G. in tail male lapsed. 15 August 1701. the testator sent for seven persons and said, I sent for you to be witnesses to my will, and sometimes to be witnesses to the republication of my will; and then took a codicil dated 15 August 1701, in one hand and the will in the other, he said, this is my will, whereby I have settled my estate, and I publish this codicil as part thereof, and then signed the codicil (which lay upon the table, with the will) in the presence of the witnesses who subscribed it in his presence. By this codicil he devised in these words; whereas I heretofore made my will, dated 11 October 1684, which I do not intend wholly to revoke, but in regard to the many accidents and alterations to my family and estate, I by this codicil, which I appoint to be taken as part of my will, devise as follows and then devised divers manors, &c. to his son Charles and his heirs, and 100 l. per annum to his nephew, then Lord Lansdown, for life. He then put the will and codicil together in a sheet of paper, and sealed them up in the presence of the same witnesses, but the will was not unfolded in their presence, nor did any of them write their names as witnesses on or under the will, or on the same paper, but on the codicil only. And by Parker Ch. J. and by the whole court this was held no republication; for since the statute 29 Car. 2, there shall be no republication by implication, but the will must be re-executed, otherwise a devise of lands shall not be good. Comyns's Rep. 384, 385. cites Hill. 11 Ann. Penphraze v. Lord Lansdown & al'.

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23. Making a codicil of personal estate and annexing it to the will cannot amount to a republication of the will. 2. Vern. R. 722. Mich. 1716. *Hudson v. Simpson*.

Mortgages released or foreclosed after the making a will, will not pass without a new publication, for it is in nature of a new pur-

24. Sir William Lytton, by his will 25 March 1700, devised all his lands to his nephew Lytton Strode and his heirs, and directed that he should take the surname of Lytton; and his personal estate he devised to dame Russel his sister and Lytton Strode, and made them executors. After his will made, Sir William Lytton purchased the equity of redemption of some mortgages in fee, which were mortgaged to him before he made his will; and 13th Jan. 1704, by a codicil attested by three witnesses, he says, I make this codicil, which I will shall be added to and be part of my last will, which I have formerly

merly made. And the Lord Chancellor Cowper, assisted by Sir John Trevor Master of the Rolls, Ld. Ch. J. Trevor, and Mr. Justice Tracy, 16 June 1708. decreed that this was *not a republication*; for since the statute 29 Car. 2. there can be no devise of lands by an *implied republication*, for the paper in which a devise of lands is contained ought to be re-executed in the presence of three witnesses. Comyns's Rep. 383. Mich. 10 Geo. 1. cites *Litton v. Viscountess Falkland*.

chafe: per Harcourt a counsel. Arg. 3 Ch. R. 179. Trin. 7. Ann. Litton al' Strode v. Faulkland; and per Cow-

per C. accordingly. Ibid 188.

25. A *bequest void at first* may by publication after be made good. As if A. gives to M. his wife a piece of plate, &c. and he has no such wife at the time, but after marries one of that name, and then publishes his will again; now this shall be a good bequest. Wentw. Off. Executors 25.

26. A will *revoked may be set on foot again*. 1st. By a *codicil* annexed thereunto. 2dly, By *adding any thing* to the will, or making a new executor. 3dly, By *express speech* or word that it should stand or be his will. Wentw. Off. of Executors, 24.

27. If one of the executors names is *stricken out*, and a *set is written over his head* by the testator, or by his appointment, now he is revived executor; so if the testator expresses by word in the presence of witnesses, that the party put out shall yet be executor; but this is where the executors name is not so blotted out but that it may be read and discerned, for else the set is upon nothing, and if the verbal re-affirmance should renew his executorship, then must the will be partly in writing, and partly nuncupative, his name not being to be found in the nuncupative will. Wentw. Off. of Executors, 25, 26.

(Z. 2) Set aside. For Fraud, Circumvention, &c.

1. **T**HE father having one only child devised the surplus of his estate to three executors in trust for M. whom he intended to marry, whereas she was a *lewd woman*, and a *feme covert*. The child brought a bill, the trust not being fully proved. Two of the executors declared by answer, that the trust was for the said M. but the third declared he conceived it was for the plaintiff, and that the father declared no trust in him for the said M. and the court decreed for the child, the trust not being fully proved. Chan. Rep. 101. 11 Car. 1. Aynsworth v. Pollard.

2. A. by will gives his lands to his wife, and her issue, out of the name and blood of A. The plaintiff insists that this will was *contrived* by the wife, contrary to the intent of A. and *against certain notes written by him*, whereby he had settled the said lands on the plaintiff and his heirs, after the decease of the wife, and proved that the testator intended to prefer him being of his name and blood, and drew notes for his will, whereby he gave the lands to the wife for life, and after to the plaintiff and his heirs. But
A. left

A. left the perfecting his will to an attorney, who prevailed with A. to let the will be as he should pen it. It appearing the said W. had declared to several, that she had the land but for life, and the court conceiving A. to be but *weak*, in regard he left it to the direction of the attorney, declared, and is of opinion that the said will was a very *ineffectious* will, seeking to prefer strangers before name and blood. Chan. Rep. 123. 14 Car. 1. Maundy v. Maundy.

3. If a man makes a will in his sickness by the over importuning of his wife, to the end may be quiet, this shall be said to be a will made by constraint, and shall not be a good will. Per Roll Ch. J. in a trial at bar. Sty. 427. Mich. 1654. Hacker v. Newborn.

4. The case was, T. of E. deceased having made a will and thereby made his wife sole executrix; the defendant T. the son bearing of this will, came to his mother in the life-time of his father, and persuaded her, that there being many debts, the executorship would be troublesome to her; and desired that he might be named executor, for that he by reason of his privilege of parliament could struggle the better with the creditors, and persuaded his mother to move his father in it; declaring that he would be only an executor in trust for her; and the mother accordingly prevails on the father that it might be so; and thereupon T. the son gets a new will, whereby a legacy of 50l. only is given to his mother, and therein he makes himself sole executor, and cancels the former will, though the father opposed the doing thereof; and the last will was read over so low, that the testator could not hear it; and when he called to have it read louder, the scrivener cried he was afraid of disturbing his worship. The defendant having thus made himself sole executor, and procured this will to be executed, where only a legacy of 50l. was given to his mother, set up for himself, and denied the trust for his mother; and in his two first answers he denied the will was drawn by his directions, and that the 50l. therein given to his mother, was without the testator's privity; but in his third answer he confessed it. Upon the whole matter it appearing to be, as well a fraud, as also a trust, the Lord Keeper, notwithstanding the statute of frauds and perjuries, though no trust was declared in writing, decreed it for the plaintiff, and ordered that the defendant should be examined on interrogatories, for discovery of the estate. Vern. 296, 297. pl. 290. Hill. 1684. Thynn v. Thynn.

5. The plaintiff, a woman, getting the ascendant over a young lady, made her swear to make her will, and thereof the plaintiff executor, and to give her all her estate, and when such will was made, made her swear not to revoke or alter it. The young lady fell sick, complained of the usage, consulted what to do, was much concerned at the injury done her relations by this will, but afraid of being damned if she altered it; and so died much disturbed. The will concerned personal estate only, and was proved in the spiritual court. The plaintiff prayed the assistance of the court to get at a term for years, which was in trustees for the testatrix. But Jeffries C. declared, that though the will being of personal estate only, and being proved in the spiritual court, could not be controverted here, yet the plaintiff should have no aid from this court, and therefore dismissed the bill, that he did not see how this could be called a will,

will, when not ambulatory as a will ought to be, nor made freely and voluntary, but gained by restraint and force on the party. 2 Vern. 76. Trin. 1688. Nelson v. Oldfield.

* 6. A bill was brought to have a will set aside, being obtained by fraud and circumvention; and my Lord Chancellor was clear of opinion, that a will may in equity be set aside for fraud or circumvention. Abr. Equ. cases, 133. Mich. 1700. Welby v. Thornargh.

But it has since been decreed in the house of Lords, that a will that a will

of a real estate could not be set aside in a court of equity for fraud or imposition, but must first be tried at law on devise or vel non, being matter proper for a jury to inquire into. Abr. Equ. cases 133. the 28th July 1728. Brambisy v. Kerridge. — Abr. Equ. cases 406. (C) pl. 4. S. C.

7. Will obtained in extremis, and upon importunity of testator's wife, his hand being guided in the writing of his name, set aside. MS. Tab. May 15th, 1711. Money Penny v. Brown.

8. A. devised land to M. his mother in fee. J. S. persuaded her that the will was not well guarded, but he would draw another which should be sufficiently guarded. He after drew a will in which he gave to M. an estate for life only, the remainder in fee to himself. Upon a bill to establish the first will, because of the ill practices used in obtaining the after will, Cowper C. directed an issue in Middlesex, and where the will was made (though the lands lay in Shropshire) to try, whether the will by which the lands in fee were devised to M. was the last will of A. the testator or not. Wms's Rep. 287, 289. Mich. 1715. Goss v. Tracy.

2. Vern. 699. pl. 622. S. C.

9. So if J. S. had persuaded the testator himself in the same manner, and had after limited the remainder in fee to himself, this would have been a good will in law, if attested pursuant to the act of parliament, but would be set aside in equity for the fraud. But as to the testator's being non compos, that is intirely at law and to be tried there. Per Cowper C. Ibid. 288. in S. C.

10. There may be a fraud in obtaining a will, that may be relievable in equity, and of which no advantage can be taken at law. As if A. agrees to give the testator 2000l. in bank-bills, if he will devise his estate to him, and on delivery of such bills makes his will and devises his estate to him, and the bills prove to be forged or counterfeit. Per Ld. Chan. 2 Vern. R. 700. Mich. 1715. in case of Goffe v. Tracy.

Wms's Rep. 288. Mich. 1715. per Cowper C. in S. C.

11. Bill to be relieved against a will obtained by fraud and imposition upon this case. The plaintiff's son had made a will in Jan. 1716, and thereby devised all his real and personal estate to the plaintiff his father, but falling ill soon after at a great distance from his father of a consumption of which he died, the defendant persuaded him to make a new will some short time before his death, whereby he devised all his real and personal estate to the defendant (being his kinsman) upon trust to pay his debts and legacies but says nothing of the residuum, but there is the general clause of revoking all former wills, &c. There were several witnesses to prove an imposition, and contrivance, and false suggestions to induce the testator to make this new will, sufficient to satisfy the court that it was unfairly obtained, but the will was regularly signed, sealed, and published as statute 29 Car. 2. of frauds doth direct, and so a good will at law.

Equity Abr. 133. (B.) pl. 19 and 406. (C.) pl. 4. cites S. C. that it was decreed in the house of Lords, that a will of a real estate could not be set aside in a court of equity for fraud or

imposition,
but must
first be
tried at law
on devisa-
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it being
matter pro-
per for a
jury to in-
quire into.
July 28,
1728.

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It was insisted for the plaintiff, that this being obtained by fraud and contrivance, though duly published according to law, ought to be set aside in a court of equity. That this court is proper to give relief in all cases of fraud. That a deed obtained by fraud and contrivance is constantly set aside in this court, and that there is the same equity to set aside a will so obtained, and some cases were cited to this purpose, but none seemed directly in point of a will duly published and good at law being set aside in this court for * fraud, but several cases were put, wherein it might be reasonable to set aside wills for fraud and imposition.

It was insisted for the defendant, that there was no precedent for setting aside a will duly published for fraud and imposition in this court without a trial at law, that it would be of dangerous consequence and full of inconveniences to set aside wills in equity, which are good at law. One witness swears, that the will was not truly read over to the testator before publication, that if this deposition be true the will is void at law, that here were variety of evidence, and therefore proper to go to a trial at law upon a devisavit vel non devisavit, or any other issue that the court should think proper to direct, and insisted that without a trial at law this court could not set aside a will duly published.

It was replied, that the fraud in this case depends upon a great number of circumstances, and that no issue can be framed to take them all in, nor can a jury well be charged with them; that fraud is the proper business of this court, and that in case of fraud it is not necessary to grant a trial at law.

Parker C. said, I am very well satisfied that this will was obtained by fraud and imposition by the evidence that has been read, and that plaintiff ought to be relieved, but will take two or three days to consider what relief is proper in this case; methinks this will should stand as to the creditors to secure their debts, which are not provided for by the former will, for in that the real estate is not charged with them, but before I will totally set aside this will, I will consider well of the consequences. Et postea (ut audivi) he decreed the defendant to account for the personal estate having just allowances, &c. and to convey the real estate to the plaintiff subject to the payment of the debts of the testator, as a trustee for the plaintiff. N. B. This decree was reversed by the House of Lords as to fraud, and the devisee to have the freehold and personal estate subject to payment of debts. MS. Rep. Mich. 5 Geo. in Canc. Bransby v. Keridge & al'.

12. R. Son to the late earl of Radnor married the only daughter and child of B. who was so passionately fond of his daughter, that whenever she was in his presence, he would break out into great fits of passion and weep for joy to see her. Notwithstanding this great fondness of his daughter, one W. took an opportunity when B. was under an arrest, and officiously came to bail him, and insinuates into him, that his son-in-law was the occasion of his being arrested; and thereupon wrought so far upon him as to get him into a private place, where he was removed out of his son and daughter's knowledge, and where he went by a strange name; no one of his friends

2 Wms's
Rep. 270.
Pasch.
1725. in
case of
James v.
Greaves it
was said by
Ld. Com-
missioner
Jekyll, that
there was a
difference

friends had any access to him but W. himself, and such as he would permit. R. made frequent application to be admitted to him, but was refused, which was all in proof. While he was under this concealment, W. tampers with one B. that had B's will in his custody, and would have had him suppressed that will, whereby he gave his estate to his daughter. It happens, *during his being thus secured he fell sick*, then there is a will prepared for him to give this estate away to W. from his only daughter; they get three witnesses to the execution of it. This will was never read over to him; this appears in the proof; but they got him to execute it; and he dies. Hereupon R. exhibits his bill in this court to set aside this will. There was proof made of all this matter that was opened, and this point of surprise in obtaining this will was insisted upon strongly. The Ld. Chancellor at the hearing was assisted by the Ch. J. Bridgman, the Ch. B. Hales, and J. Rainsford. But notwithstanding all this proof they* could not prevail to set aside this will in this court; and afterwards when they came into the House of Lords they were of the same opinion, and it ended at last in relief by the legislative power, an act of parliament; cited by Baron Powell. 3 Chan. Cases 61. in case of Bath and Mountague as the case of Bodmin v. Roberts.

between a deed and a will gained from a weak man, and upon misrepresentation or fraud; for if a will be gained from a weak man, and by false representation, this is not a sufficient reason to set it aside in equity, as was determined in the case of the late Duke of Newcastle's will be-twixt Lord Thanet and

Lord Clare, and in the case of Bodmin and Roberts; but where a deed (which is not a will) is gained from a weak man upon a misrepresentation, and without any valuable consideration, the same ought to be set aside in equity.

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13. Will set aside after forty years possession under it upon account of the insanity of the devisor and although in prejudice of a purchaser. MS. Tab. Feb. 24, 1726. Squire v. Perhall.

14. Executor of a will which was obtained by fraud but proved in the spiritual court, decreed as to so much of the will as subjected the lands for payment of debts it should stand, but as to the rest, the executor to be a trustee for the devisee of the former will; decreed per Ld. Chancellor but reversed. MS. Tab. March 11, 1727. Kerrick v. Bransby.

(Z. 3) Rasures, &c. in a Will. What is to be done.

1. **W**HERE there are *rasures* in a will and the executor submits that the will should be proved, as if no such *rasures* had been made, and annexes to the will an instrument purporting such consent; North K. thought the executor concluded by this consent, but said, the usual course in such cases is to have a sentence against the rasure, and then a *probat* granted with the words rased out, inserted therein. Vern. 256. pl. 249. Mich. 1684. Parker v. Ash.

2. If one of the executors names be struck out, and afterwards a *set be wrote over it* by the testator or by his appointment; now he is revived executor. Wentw. Off. Ex. 25, 26.

(Z. 4) In Cases where the Will is set aside, What Allowances shall be made the Executor as to Payments by him.

1. A. By will devises his lands to his wife during the minority of his son, and dies, and has only a posthumous son, and gives her power to make leases to raise money to pay debts, &c. She enters, takes the profits, and marries. The second husband lives some years and takes the profits of such land as she had not let, the other part she had let pursuant to the will. The son comes of age and proves a revocation of the will, and prays his mother may account; it was ordered that she account for all the profits taken by herself or her second husband, and the reason was, that he should be said to take them till the infant was fourteen years old *as guardian*, and after *as bailiff*, and she was to answer as to what her husband took as in a *devastavit*. And whereas she had paid legacies charged by the will on the lands, it was ordered, that she be allowed those, but as for the leases made by her, though they were for fines and full rents, though she offered to account for the fines and rents the court would not make them good, because the mother could not set, or let, lands. Ch. Cases 126. Pasch. 21 Car. 2. *Hele v. Stowell*.

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(A. a) Consent to a Legacy.

In what Cases it is necessary. To what Thing.

S. P. Per Thirn. Br. Devise, pl. 11. [1.] If certain goods are devised to one, he cannot take them without the delivery of the executor. 11 H. 84.]

11. cites S. C. — No devisee may take the legacy of his own authority, but ought to have it delivered to him by the executor, or to sue for it in the spiritual court. Br. Devise, pl. 3. cites a H. 6. 16.

Bridgm. 54. cites S. C. and 37 H. 6. 8. a. where a diversity is taken as here, and that it is there said that if the thing devised is certain, and a stranger takes it, the executor shall have an action of trespass; but that in old N. B. 87. there is no such diversity. — Kelw. 128. pl. 93. *Causus incerti temporis* is a nota, per Keble, that devisee of a thing certain may take it without the delivery of the executor; but otherwise of a thing uncertain. — If a man devises a thing uncertain, as the third part of the goods, &c. and a stranger takes it, there is no remedy but to sue for it in the spiritual court, but *quære* if he may take it out of the possession of the executor? for it may be that the debts exceed the goods, and then the devise is void. Br. Devise, pl. 6. cites 27 H. 6. 8. — All. 39. Hill. 23 Car. B. R. in case of *Eeles v. Lambert* in B. R. it was agreed by counsel, and also by the court, that though the legacies were devised in specie, yet the legatees could not take them without the assent of the executors. — Mar. 137. Mich. 17 Car. Heath J. said, that all the books hold an assent necessary, except a H. 6. 16. and 22 H. 6. 7. which seem to take a difference where the legacy is given in certain, and in specie, that there it may be taken without assent; but where it is not given in certain, there it cannot; but he held clearly the law to be otherwise, and that though it be given in certain, yet the legatee cannot take it without the executor's assent; for to the executor should be subject to a *devastavit*, without any fault in him, or any means to help himself. — Goods in specie are devised, yet the legatees have no property before the executor has delivered them, any more than if they had never been devised; agreed per counsel on both sides. Sti. 54. Mich. 23 Car. in case of *Eeles v. Lambert*. But

But legatee has an interest in them presently. Arg. 55. ut ante. — Arg. Bridgm. 54. contra, and says in old N. B. 87. there is no difference between a thing certain and not certain.

And. Wentw. Off. of Executors, 221. that if testator bequeath goods in the hands of J. S. to J. S. yet the property is not transferred to J. S. without executor's assent, though executor has sufficient for payment of debts without them, and therefore executor may at common law recover the thing or damages against the legatee.

[2. If a man possessed of a lease for years of land devises it to another, the devisee cannot have it, or enter into it without the assent of the executor or administrator. Tr. 39 El. B. R. P. 11 Ja. B. per Curiam.]

3. If A. devises a chattel to B. for life, the remainder to C. this S. P. For it chattel cannot be taken without delivery of the executor. Br. Executors, pl. 133. cites 37 H. 6. 30. per Priot. S. P. For it may be that all the goods are not sufficient to discharge the debts and funerals; but when the devise is made to the executors, there the executors may take it; for he has no other remedy; for he cannot sue against himself and his companion. Br. Devise, pl. 13. cites S. C. — But when a chattel is devised to one the remainder to another, if the executor deliver it to the first, and after he dies, there the second may take it; for the first delivery is executed for all; per Priot and Needham; contra per Danby; but executors ought to make delivery to the second also. Ibid.

4. And by him if the executor gives it to another, the devisee has no remedy by the common-law; but it seems that he shall have it, or the value, by the spiritual-law. Ibid.

5. If a legacy be devised thus, let B. have such a thing, there B. may take it without the delivery of the executor. Arg. Sti. 73. in case of Eccles v. Lambert, cites 2 E. 4. 13. [171]

6. In trespass per Brian Ch. J. where a termor devises his term, the devisee cannot enter after his death without livery of the executor, by which he said, that the deviser made the plaintiff and this defendant his executors, by which he entered; and per tot. Cur. he may enter and hold in severalty. Br. Devise, pl. 24. cites 20 E. 4. 9.

7. If a man devises by special name or generally goods or chattels real or personal, and dies; the devisee cannot take them without the assent of the executors. Co. Litt. III. 2. Fin. Law? 8vo. 172. S. P. — Wentw.

Off. of Executors. S. P. as to chattles, tho' heretofore some opinion has ran otherwise, and in Marg. cites 27 H. 6. 8.

8. When a man is seised of lands in fee and devises the same in fee or fee tail, for life, or for years, the devisee shall enter; for in that case the executors have no meddling therewith. Co. Litt. III. 2.

9. Lessee for years on condition not to alien, or devise to any, but his children; by devising it to a stranger the condition is broken, though the executor never assents to the devise. Cro. J. 75. pl. 4. Trin. 3 Jac. B. R. Horton alias Burton v. Horton.

10. If a legacy be given to one of the executors themselves, he may take it without any assent of his co-executors, and that before administration, if he will. Perk. S. 572.

11. If the testator has land for the term of twenty years, and he devises the same land unto one of his executors, he may enter and occupy the land according to the devise without the assent of the other executors, &c. Perk. S. 572.

12. If the testator was a termor for years and had devised *parcel of the years unto all the executors, &c.* The stranger who is in remainder shall not enter, nor occupy without the assignment of the executors, because it cannot appear, whether they occupy the lands as executors or as devisees. And therefore it shall be taken, that they occupy as executors, and not as devisees; for that is more for the benefit and profit of the soul of the testator; Tamen Quere, how they shall be adjudged in the land in such case, &c. Perk. S. 574.

13. If a man has land for term of years, and makes his will and devises the same land unto *A. the wife of J. S. and makes the same J. S. his executor* and dies, and *J. S. enters* into the land, and occupies the same, *but it does not appear whether he occupies the same as executor, or in the right of his wife, and J. S. makes his will, but says nothing of the term in his will, and makes T. K. his executor and dies within the term*, it seems that the wife, who was devisee, cannot enter into the land devised unto her without the assignment or assent of the executor of her husband. Tamen Quere. Perk. S. 575.

14. As to all chattles, real and personal, devised; if the executors will not deliver, assign or pay them unto the devisees, they have no other remedy but to sue for them in the spiritual court, for the law does more respect the soul of the deviser than the devisees, and therefore the law will not suffer the devisees to take their legacies out of the possession of the executors in despite of them, because the legacies shall not be assigned, delivered, or paid, until all the debts of the testator be satisfied or paid, in so much as if the executors assign, deliver, or pay the legacies before the debts of the testator are paid, and there be not sufficient goods of the testator to pay his debts, the executors shall be charged of their own goods, &c. Perk. S. 570.

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15. Notwithstanding, that a man devises a chattle real or personal by his will, yet the executors are bound in law to pay the debts of the deceased, before they pay or deliver any legacies. And therefore the common law is, that the devisees of chattles real or personal cannot enter upon the legacies, nor take them without the assignment or delivery of the executors, or by their assent, or without the assignment or delivery, or assent of one of them; and the reason is, because the soul of the testator shall not be in danger for the non-payment of his debt, &c. Perk. S. 488.

16. If one devises his lease-land to his executor for life, the remainder over, there ought to be a special assent thereto by the executor, as to a legacy, otherwise it is not executed. Cro. C. 293. pl. 3. Hill. 8 Car. B. R. Rose v. Bartlet.

17. A legatee hath not any interest grantable before assent, yet he hath an interest releasable; per Brampton Ch. J. Mar. 139. Mich. 17 Car.

18. If an executor refuses to assent, he may be compelled by the spiritual court. Mar. 96, 97. pl. 167. Trin. 17 Car. C. B. Anon.

19. Testator releases a bond by will, it is not good. But quære, What assent is requisite to such bequest? Sid. 422. pl. 11. Trin. 21 Car. 2. B. R. Pigeon v. Harrison.

20. Executors assent is not material where there is no devise; as where it was on a condition precedent, which never happened, Adjudged. Cumb. 438. Trin. 9 W. 3. B. R. Escourt v. Warry.

(B. a) Who may Consent.

[1. **A.** Feme covert executrix may consent to a legacy. 7 H. 4. Br. Executors, pl. 47. 13. b.] cites S. C.

and S. P. admitted. — Fitzh. Executors, pl. 55. cites S. C. that she may pay legacies. — 5 Rep. 27. b. Hill. 26 Eliz. B. R. in Russel's case the court denied the opinion in 16 H. 6. Release 45. as to feme covert executrix; for though she is executrix, yet she can do nothing to the prejudice of her baron; but that without doubt the release of the baron is good. — The assent of a feme covert will not bind herself. But the assent of the baron is sufficient where the wife is executrix, even though she be within age, if he be of full age, but not if he be under 21, and she above 17. as it seems, unless there are assets sufficient, which in this case perhaps may be material, though not in the other. Wentw. Off. of Executor 223. — Sid. 188. pl. 14. Pasch. 16 Car. 2. in case of Cookes v. Bellamy, the court held, that though anciently it had been a point, yet since Russel's case in Co. Rep. they thought it was settled, that feme covert cannot assent to a legacy, and so was their opinion.

[2. If there be two executors and goods are devised to one, he may assent to his own legacy, and take the goods without the assent of the other. 11 H. 4. 84.]

[3. If the testator devises a lease for years to his executors, one executor without the other may consent to the legacy, as to his own part, without any consent made by the others. M. 37 El. B. R. between Pannel and Fen, admitted.]

4. An infant executor at the age of 18 years, may assent to a legacy; per Anderson Ch. J. Cro. E. 719. in pl. 46. Mich. 41 & 42 Eliz. C. B. 5 Rep. 29. a. Hill. 40 Eliz. C. B. Piggot's

Cafe. S. C. — Cro. E. 602. pl. 14. S. C. — 5 Rep. 29. b. Mich. 41 and 42 Eliz. C. B. S. C. and S. P. cited per Cur. as adjudged Hill. 40 Eliz. C. B. Pigot v. Gascoigne, that infant executor before 17, cannot assent to a legacy, &c. — Wentw. Off. of Executors 223. S. P. — S. C. cited Roll. Rep. 248. Mich. 13 Jac. — S. C. cited Sid. 188.

5. If there are several executors the assent of one only is sufficient. Wentw. Off. of Executors, 223.

(C. a) [Assent to a Legacy.]

At what Time it may be made.

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Fol. 619.

[1.] If a man hath a term for 52 years, and devises this term to his executor after his legacies paid, and devises 10l. to be paid to the issue of a stranger when he comes to 21; the executor shall not have this as a legacy by any assent till the issue comes to 21, and

and until he has paid him the 10l. or made an agreement with him for it. Pasch. 6 Ja. B. between Brand and Dane, per Curiam.]

[2. But in the said case, if he *devises* 40l. to be yearly paid to a stranger for 52 years, this shall be a legacy in him *presently* by his assent; for that otherwise he should never have it as a legacy, inasmuch as the 40l. is to be paid during all the term. Pasch. 6, Ja. B. dubitatur.]

3. A term was *devised* to an executor, who entered before any probate of the testament, and occupied the land for a year and more, without any probate, and died. It was ruled that the property of the term was lawfully in the executor by his entry without any probate. D. 367. a. pl. 39. Mich. 21 & 22 Eliz. Anon.

4. Wentw. Off. of Executors, 225, thinks an assent cannot be made after a *disassent*. Yet he makes a quære. Because such refusal may be controlled by the spiritual court or court of equity. But he says, that notwithstanding a decree in such court, he sees not how any legal interest can be transferred by that compelled assent.

5. Nor after an assent to a legacy can an executor *disassent*. Wentw. Off. Executors 225.

6. If the executor *rides or drives in his coach a horse bequeathed to* J. S. So if he uses him at plough, this seems not such disagreement to the execution of the legacy as that the executor cannot after assent to the legatee's having thereof, Wentw. Off. Executors 225.

7. Nor is the executor's continuing to *depastrure* land, the term whereof testator devised to J. S. any disagreement to the execution of the legacy. Wentw. Off. Executors 225, 226.

8. But if this lease-land had been *leased out* by testator from year to year, and the executor *discharges the tenant and takes it into his own hands at the year's end*; this seems to be a *disassent*, Wentw. Off. Executors 226.

9. So perhaps may his taking or *distraining for rent due after testator's death*. Wentw. Off. Executors 226.

10. Where a term is *devised* to A. and after the testator's death the executor takes a new lease of the same land for more years in possession or to begin *presently*. By this the term left by testator was surrendered and drowned, so that it could not pass to A. by the executor's assent after. Wentw. Off. Executor 226. cites it as held in case of Lowe v. Carter.

11. If a legatee dies before assent by the executor, yet the legacy will be good, and the executor may assent afterwards, and this shall be assets in the hands of the executors of the legatee. Mar. 135, 137, 139. pl. 209. Mich. 17 Car. Southward v. Millard.

12. An executor, before probate, may assent to the delivery of a legacy, or that the legatee do take or receive his legacy. Godolp. Orp. Leg. 144. cap. 20. S. i.

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13. An assent after refusal was allowed to prevent a forfeiture, for a forfeiture shall not bind where a thing may be done afterwards or any compensation made for it, unless where there is a devise over to a third person. 2 Vent. 352. Hill. 32 & 33 Car. 2. in Canc. Cage v. Ruffel.

(C. a. 2) Assent. How it may be made.

1. **A** SSENT to a legatee may be *on condition precedent*, as thus; I am content that if you can get and bring in to me such a bond in which testator was bound to J. S. that then you enter upon the term or take the corn and cattle to you bequeathed. Wentw. Off. Executor 236.

If a term is devised to J. S. and the executor assents that J. S. shall have it on condition, the legatee shall have it absolutely. For after the assent of the executor, he is in by the devise. Per. Cur. 4 Rep. 28. b. in pl. B. R.

2. *So of other like conditions preceding the assent*; as if you get the consent of my executor; or if you will pay the arrearages of rent due to the testator at his death; or if you will pay the wages already due to the servants attending about the cattle or corn to you bequeathed; in such cases there is no assent unless the condition be performed. Wentw. Off. Executor 236.

3. *But if it be on condition subsequent*, as thus; I agree you shall have the thing bequeathed, provided you shall pay 10l. yearly to me, or to such creditor of testator's, and is like the case of attainments. Went. Off. Executors 236, 237.

17. Trin. 33 Eliz.

4. Assent to make a devise good may be *by an agreement either by word or deed*; and it seems that whatever words or verbal agreement will be a good attainment in law may make a good assent to a legacy; if therefore the legacy be agreed to on certain terms and conditions, this will be a sufficient assent in the executor to perfect the legacy. Godolph. Orp. Leg. 144, 145. cap. 20. s. 1.

Non refert an quis assensum suum præbet verbis an rebus ipse & factis. 10 Rep. 52. b. in Lampet's case.

52. b. in Lampet's case.

(D. a) What shall be said an Assent in Law to a Legacy.

Keb. 15. the cases cited.

[1. **I** F a term be devised to an executor for a certain time, the remainder over, and the executor enters generally, he shall be adjudged in by the law as an executor, and not as a legatee, because if he should be adjudged in as a legatee, perhaps this would be a devastavit, and so the law would do a tort, and also by this the remainder would be settled, and could not be devised by the disassent of the executor after, which would be mischievous to the executor. Mich. 37 El. B. R. between * Pannel and Fen, per Curiam adjudged. Co. 10. † Lampet 47. b. adjudged. Mich. 11 Ja. B. R. between Ellis and Osborn, agreed.]

* Mo. 350. pl. 470. 3. C. the devise being to his executors till they had paid all his debts and legacies, and adjudged that they shall take it as executors.

— Cro. E. 347. pl. 19. S. C. resolved accordingly. — Gouldsb. 185. pl. 125. S. C. Clench and Fenner held, that they take as executors, but no judgment. — † 2 Brownl. 172. Pasch. 10 Jac. C. B. Lampet v. Starkey. S. C.

See the divisions at tit. Executor (where he shall take as executor, and where as legatee or devisee.)

[2. If a man *devises a term to his executor, and he enters generally*, the law shall say prima facie that he is in as a legatee because this is better for him, and the law intends that the executor assented to it, and *if he be in danger of a devastavit, he may after death to be in as executor, and so explain this general entry*, so there shall not be any devastavit. Mich. 37 Eliz. B. R. 4. between * Pannel and Fen, per Curiam. 19 Eliz. Lord Windfor's case adjudged, Mich. 11 Ja. B. R. between Ellis and Osborn dubitatur, though the executor had sufficient for all debts, legacies, and funerals.]

Mo. 351. pl. 470. cites 20 Eliz. Lord Boroughs v. Lord Windfor S. C. says it was adjudged a forfeiture

[3. If *lessee for [years] leases for years, upon condition that he shall not alien by will or otherways, and he devises it to his executors who enter generally*, it seems that he shall not be said in, prima facie, as a legatee, but as executor, because if he should be in as legatee, this should be a breach of the condition, and then no subsequent election of the executor to be in as executor could help it. Contra, 19 Eliz. Lord Windfor's case adjudged.]

and breach of the condition, because the general entry shall be intended as devisee; cited by Tanfield; and Fenner J. said, that it was so adjudged to his knowledge. — S. C. cited as 24 Eliz. Lord Windfor v. Burry, and that if the legatee had not been executor, the condition had been broken. D. 45. b. Marg. pl. 3.

Brownl. 132. S. C. Foster, Warburton and Walmsley held, that it was an assent, but Coke e contra.

[4. If a man *devises a term to his executor and dies, not being indebted, and the executor enters generally*, this shall not be adjudged in law in him as a legatee, and to a consent to the legacy. Pasch. 8 Ja. B. between Hellam and Ley. Dubitatur, Trin. 8. Ja. B. for *there may be debts which are not yet known.*]

Fol. 620.

[5. If a man *devises a term to his executor and dies, and the executor enters generally, and converts the profits to his own use*, this is a consent to the legacy. Mich. 11 Ja. B. R. in Ellis and Osburn's case, per Coke.]

[6. If a man possessed of a term for certain years, *devises it to another for his life, with several remainders over, and makes the first devisee his executor, who enters generally, and by deed, reciting, that whereas he had a certain estate for years in the said land by the devise of J. S. who was the deviser, he grants it over to another*, this is a good explanation of this entry, scilicet, that he entered as legatee, and so a consent to the legacy. Mich. 15 Ja. B. R. in one Shrene's case, per totam Curiam:]

Brownl. 132. S. C. Foster, Warburton and Walmsley held it an assent, but Coke e contra.

[7. If a man *devises a term to his executor and dies, not being indebted, and the executor enters generally, and says, that his testator had given no legacy from him, but had left all to him*, admitting that upon the general entry, he should not be adjudged in as legatee, it seems these words should not make any consent to the legacy, P. 8 Ja. B. between Hellam and Ley. Dubitatur, Trin. 8 Ja. B.]

8. If the executor *delivers to devisee goods to him devised to re-deliver them again at such a day, the same is a good assent, and execution of the devise, and the words of the re-delivery are void*. Arg. Le. 130. in pl. 176. cites 2 E. 4. 13.

9. A term for years is devised to A. The executors of the devisor entered into the land for the use of the devisee. The opinion of the court was, that the same was a sufficient possession to the devisee. 3 Le. 6. pl. 15. 4 Eliz. C. B. Anon.

10. If a man possessed of a term of years devises it to his wife for so many of the years as she shall live, and after her decease the remainder of the term to J. S. and maketh his wife executrix, and she enters, claiming to have it only for life, the remainder to J. S. according to the devise; in this case this is a good assent for the execution of the residue of the term to J. S. Plow. C. 516. Hill 20 Eliz. Welkden v. Elkington. [176]

11. If a term for years be given to the wife of the testator during the minority of the eldest son, to the intent that she, with the profits thereof, shall breed up his children, the remainder of the term to the same eldest son, and she is made executrix, and she enters generally, but doth always breed the children of the testator. This execution is an assent against her, to vest the estate to the eldest son. Plow. Com. 539. b. 545. Hill 21 Eliz. Paramour v. Yardley.

12. Assent is not to be apportioned. Le. 129. pl. 176. Trin. 30 Eliz. Coleburn v. Mixstone.

An assent to devisees for life of a case.

term, is an execution of the devise to him in remainder. Gouldsb. 96. Arg. cites Pl. C. Weldon's case.

13. Testator devised several houses; an entry into one of the houses is a sufficient agreement for the whole; for it is an intire legacy; and the entry shall be adjudged most beneficial to the devisee. Le. 129, 130. pl. 176. Trin. 30 Eliz. B. R. Coleburn v. Mixstone.

14. If a term is devised to J. S. and the executors agree and assent that J. S. and J. N. shall have the term; in this case J. S. shall have the term solely; for after the assent of the executors he is in by the devise. Per. Cur. 4 Rep. 28 b. in pl. 17. Trin. 33 Eliz. B. R.

15. Executor declaring that the testator (her husband) had given her all, and nothing from her, held to be an assent. Brownl. 132. Trin. 7 Jac. Hellam v. Lee.

16. The executor, who has the first estate devised to him, says, that he to whom the remainder was limited shall have it after his death; Arg. 2. Brownl. 173. cites it as resolved, 8 Rep. 94. b. [Trin. 7 Jac.] in Manning's case to be a good execution and election.

17. The testator devised a pecuniary legacy, and then told his executor that he had by his will given such a legacy, and I would have you increase it to such a sum, this is called commissum fidei in the civil law; and held a good legacy. Cro. J. 345. pl. 14. Pasch. 12 Jac. B. R. Penfon v. Cartwright.

2 Bullst. 207. S. C. accordingly. — Godb. 246. pl. 344. Pasch. 12 Jac. Cartwright's case.

S. C. adjournatur.

18. A devise of a chattle real to E. for life, remainder to J. H. and made Lowe the husband of E. his executor. And J. H. devises it to G. H. and Hen. H. and dies before E. And Lowe says, if E. my wife were dead my estate in the premises were ended, and then it remains to the Holloways. This is here an assent, for he took

took notice of it as a legacy, and that he would have it in that right, though it would not go to the devisee of J. H. he dying before E. Mar. 135. pl. 209. Mich. 17 Car. Southward v. Milward.

19. An executor shall never be made to assent to a legacy by implication, where it is found that he hath not assets, but there ought to be an express assent by reason of the great prejudice which might come unto him. Per Brampston Ch. J. Mar. 135. 138. pl. 209. Mich. 17 Car. Southward v. Milward.

20. An assent is a perfecting act which the law favours, and therefore it has been adjudged, that where an executor did contract with the devisee for an assignment of the term to him devised, that it was a good assent to the legacy; per Brampston Ch. J. Mar. 139. Mich. 17 Car.

[177]

21. Devise of a term to a feme for life, who is executrix, remainder to A. the feme here takes, as executrix, the whole term, till she agrees to the devise, but on proof that she said, that *she would take the term according to the will*, this was held an assent sufficient; so a case was cited where it was ruled that it is good, if she had said that *A. was to have the estate after her*. 1 Lev. 25. Pasch. 13 Car. 2. B. R. Garret v. Lister.

22. *I thank my husband he hath done kindly by me in giving me this land and my son after me*. This was a good assent by feme executrix to take as devisee; and per Windham, the *not bringing a writ of dower* may be taken for an assent after her death. And if the *faith that the heirs (for whom lands are devised in trust) shall have them undivided*, it is a good assent. Keb. 15. in pl. 43. Pasch. 13 Car. 2. B. R. cites Cromwell v. Giles.

23. The testator by his will desired his executor to give B. 200 l. this is a good legacy, though he left it to the executor's own free-will, how, when and in what manner to dispose it, and gave no particular directions himself; the court decreed payment of the 200 l. Chan. Rep. 246. 16 Car. 2. Brest v. Offley.

2 Vent.
358. S. C.
— Lev.
25. Garret
v. Lister.

24. A small matter shall amount to an assent to a legacy, an assent being but a rightful act. Per Ld. Chancellor. Vern. R. 94. Mich. 1682. Noel v. Robinson.

25. An assent may be by implication as well as express; for if in the devise or bequest the legatee be appointed to do some act, and the executor accepts the performance thereof, this amounts to an assent. Wentw. Off. of Executors 224.

26. So if a horse is bequeathed to A. and one offering to buy the horse, the executor directs him to go and buy it of A. or if the executor offers money to A. for the horse, this is an assent. Wentw. Off. of Executors 224.

27. So acceptance by executor of a grant from a devisee of a term devised was held to imply an assent that it should be the devisee's to grant. Wentw. Off. of Executors 224. cites it as the case of Low v. Carter.

(E. a) In what Cases the Consent to one shall be to another.

[1. IF a man devises a term to one for life, the remainder to another for life, with several remainders over, the consent by the executor to the first devisee will be a consent to all the remainders. Co. 10. [Mich. 10 Jac.] Lampet's 47. b. agreed.]

2 Brownl. 172. b. S. C. argued, sed adjournatur. —S. P. and on the

death of the first devisee a legal interest is vested in the next devisees by act of law, which cannot be taken from them. 3 Wms's Rep. 11. pl. 3. Trin. 1726. Per Ld. C. Macclesfield. Adams v. Pierce.

[2. If a man devises a term to his wife, if she so long lives unmarried, and if she marries, that the wife shall have a rent out of the lands, and makes the wife his executrix, and dies, and the wife consents to the legacy of the term, and enters into it, and afterwards takes husband. This consent to the legacy of the term is also a consent to the rent when the contingent happens. Mich. 13 Ja. B. R. between Goffe and Haywood, Pasch. 14 Ja. B. Adjudged.]

[178] See Roll (K) pl. 8. and the notes there.

[3. If a man devises a term to one, and a rent out of it to another, and dies, and the executor assents to the legacy of the term, this also an assent to the rent. Mich. 13 Jac. B. R. per Doderidge.]

3 Bulst. 122. in the case of Gough v. Howard. S.

C. and S. P. by Doderidge, but he said, that the assent to the devise of the rent is no assent to the devise of the term, and that this is clear, and it is as clear that an assent to the devise of the term is an assent to both. — Roll. Rep. 248. S. C. and by Doderidge S. P. quod fuit concessum, per Coke Ch. J. — Bridgm. 55. S. C. cites Pl. Com. 521. b. Welden v. Elkington, that if a termor devises a rent or a common to one, and the term to another, and dies, and the executor pays the rent, or suffers the devisee of the common to put in his cattle, this is no assent as to the term; for the term is one thing, and the profit out of it is another thing; but there in the principal case the assent of the executor to the devise to occupy the land was a sufficient assent to the remainder of the term, because the occupation of the land and the land itself is all one; and that in Plowd. Comment. 541. [521. b.] the same agreed, and that the first assent does go to all. And it is no assent to the term, neither can it be taken by implication to be any assent to the devise of rent; for every act that does enure to another act by implication, ought to be such as of necessity ought to enure to the other act which cannot be taken to be otherwise.

[4. If A, possessed of a lease for years, devises it to his executors for seven years, and afterwards to B. for twenty years, and after to C, and the heirs males of his body begotten, if the executors agree to the devise to themselves for seven years this is a consent to all the remainders. Pasch. 11 Car. between Leventhorpe and Ashby, per curiam, resolved upon evidence at the bar. Intratur Mich. 10 Car. Rot. 120.]

5. If a termor devises the occupation or profits of his land to J. S. for ten years, and after devises the land itself to J. D. for the rest of the term, in this case, if the executor assent to the legacy of J. S. this will be a good assent to the execution of the legacy of J. D. Pl. C. 521. b. Hill. 20 Eliz. in case of Welkden v. Elkington.

S. C. cited Bridg. 55.

6. But if the occupation of a book, glass, or other chattel personal be devised to one for life, and after his death to another in like sort, the assent to the first is not good to the other, for the occupations

pations are several, and in such chattles personal the occupation is distinct from the property. Finche's Law 172.

7. Assent to a thing of one nature is not an assent to a thing of a different nature, as an assent to common devised is not an assent to a devise of the land itself. Pl. C. 541. b. Hill. 21 Eliz. *Paramour v. Yardley*.

Roll. R. 248. *Goffe v. Heywood*. — But an assent to a particular estate bequeathed of a term, is good to all the remainders. 10 Rep. 47. b. the 4th resolution in *Lampet's case*. — Wentw. Off. Executors, 234. S. P. Because the particular estate, and the remainder are all but one estate in law. — The executors assent to one cannot enure to another, though of the same thing, except by way of remainder. So neither can it any way where the things are not the same, except in some very special cases, as if a tenant bequeathed a rent to A. and the land itself to B. the executors assent that A. shall have the rent, is no assent that B. shall have the land. Yet I think the assent that B. shall have the land, implies the assent that A. shall have the rent. Wentw. Off. of Executors, 235.

[179] 8. If the testator has lands for the term of 20 years and devises the land for parcel of the years unto one of his executors, the remainder unto a stranger, if the executor who is the devisee enters and occupies solely, by force of the devise, after the years determined, the stranger who is the devisee in remainder may enter and occupy the land during the residue of the years, if the other goods of the testator were sufficient to satisfy and pay all the testator's debts. Quere, if the goods of the testator be not sufficient to satisfy and pay his debts? But it seems he may enter notwithstanding that, because the devise was once executed, &c. Perk. S. 573.

Roll. Rep. 248. S. C. cites 8 Rep. Manning's case.

9. There was a devise to A. but that devise was to be void on a condition, and another thing was in such case devised in its room; per tot. Cur. an assent to the first part of the will is an assent to all which is therein contained. 3 Bulst. 123. Mich. 13 Jac. Gough v. Howard.

Roll. Rep. 148. S. C. & S. P. by Doderidge J. accordingly. And if he assents to the term, and says, that he will not assent to the rent, it is void.

10. If a rent is devised to one out of a lease, and the lease is devised to another, the executor may assent first to the rent, and if he assent that devisee shall have the term, clearly it is a good assent to the rent to charge the devisee of this term with the rent; for he assents to have the land charged with the rent; but the assent to the devise of the rent is no assent to the devise of the term, and this is clear, and it is as clear, that an assent to the devise of the term is an assent to the devise of the rent; per Doderidge. 3 Bulst. 122. Mich. 13 Jac.

And at another day it was agreed by Coke Ch. J. that it was a good assent to the rent.

11. An assent to the first devise is an assent also to him in remainder; per Mallet J. Mar. 136. in pl. 209. Mich. 17 Car. cites it as resolved in *Lampet's case* and in *Matthew Manning's case*.

12. A. makes his will in these words, viz. *I devise to J. S. all those my lands in Bramsted in the county of Surry in the possession of John Ashley*; whereas in fact A. had not any lands in Surry, but he had lands in Bramsted in Hampshire in the possession of John Ashley. And in an ejectment brought by the heir of A. for these lands in Hampshire against the devisee, it was ruled by Holt Ch. J. that these lands in Hampshire would pass by this devise, and the plaintiff

plaintiff was nonsuit at Winchester Lent assizes 1699. 10 Will. 3. Ld. Raym. Rep. 728. *Hastead v. Searle*.

(E. a. 2) The Effect of Assent by Executor.

1. IF executor delivers to the devisee goods to him devised, to redeliver them to him again at such a day; this is a good assent and execution of the devise, and the words of the redelivery are void; per Tanfield. Le. 130. at the top cites 2 E. 4. 13.

2. An assent to a void legacy doth not amount to a grant, but only that the legatee should have that which the testament had given him, and if the devise is void, the assent is void. Plow. Com. 525. b. 526. Pasch. 20 Eliz. *Branby v. Grantham*.

3. Assent, how long soever made after testator's death shall relate to testator's death for the advantage of the legatee, but not to charge him with waste committed by executor, for in such case waste shall be brought against the executor in the tenuit, and not against the devisee in the tenet. Wentw. Off. Executor 247.

[180]
Sic dictum
suit 5 Rep.
12. b. Trin.
41 Eliz. in
Sander's
case.

4. But assent will not relate to make good a grant made by legatee before assent. Wentw. Office of Executor 247, 248.

5. Assent of an executor to a devise of leases does not hinder their being assents to pay debts. Chan. cases. 257. Hill. 26 & 27 Car. 2. *Chamberlain v. Chamberlain*.

6. If an infant executor assents to a legacy, the assent is not good, unless there are other assents for debts; per Ld. Keeper. Chan. cases, 257. Hill. 26 & 27 Car. 2. in case of *Chamberlain v. Chamberlain*.

2 Freem.
Rep. 142.
pl. 179.
S. P. in
S. C.

7. When a certain thing, as a horse or a cow, &c. is devised, as soon as the executor assents the property vests in the legatee, and he may have an action at common law for the recovery of the thing; and therefore differs from the case in * 2 Roll 301. for that was for a legacy, for which the common law can give no remedy; and that is given as the reason of the case. Freem. Rep. 289. in pl. 339. Pasch. 1677. B. R. *Barton's case*.

* See tit.
Prohibition, (Q)
pl. 13.
Evans v.
King, and
the notes
there.

8. By the assent of the executor an interest is vested, and the goods devised are become a chattel, and is governable by the common law. 2 Lev. 209. Mich. 29 Car. 2. B. R. *Bustard v. Stukely*.

2 Jo. 130.
S. C.

9. When a lease is specifically devised if the executor assent, there is no longer any interest in the estate left in the executor. Arg. Vern. R. 91. Mich. 1682. *Noel v. Robinson*.

10. An actual assent to a legacy by an executor will not bind a creditor, but it will bind himself. Per *Jefferies C.* Vern. R. 455. Pasch. 1687. *Noel v. Robinson*.

11. A legacy passes not by the will, but by assent of executor to whom the will is only directory, so that the legatee is in by the executor. 1 Salk. 237, 238. pl. 16. Mich. 6 Ann. B. R. *Bunter v. Coke*.

But the
Court
doubted
somewhat
of a chattel
real. Ibid.
238.

(E. a. 3) Assent by Executor. Pleading.

If the legatee enters without the assent of the executor he is a disseisor. See Mo. 358. Carter v. Lowe. — Ow. 76. Trin. 27 Eliz. Carter v. Lowe. S. C. and S. P. admitted.

1. **A.** Seised of land grants a lease for years, and after devised it to B. In an action B. must shew that he entered into the land by leave of the executor, for he cannot enter without. Sti. 65. Mich. 23 Car. Matthew v. Earle.

[181]

(F. a) Wills. Devises.

Construction in General.

1. **T**HE defect of a will in words shall be supplied by intent of deviser in making an estate, but not in the naming the deviser or devisee. Arg. 2 Le. 165. in pl. 198. cites 49 E. 3. 3 & 4. the case of Whiteavers.

2. There will be a great difference in a will between words of restraint which do follow general words, and which do follow particular words. Per Haughton J. 2 Bulst. 176. in case of Mirril v. Nichols, cites 2 E. 4. 29.

The Master of the Rolls said, that he was sensible

3. In wills the effect or intent is more to be regarded than the Form. Arg. Pl. C. 344. b. Trin. 10 Eliz. in case of Brett v. Rigden.

that there was a diversity of opinions among the learned judges of the present time, whether the legal operation of the words in a will, or the intent of the testator shall govern, that for his part, he should always contend for the intention, where it is plain, and he thought the strongest authorities to be on that side; for if the intention be to govern, as it is admitted it must, and not always give way to the legal construction, and yet at other times shall not govern, there will then be no rule to judge by, nor will any lawyer know how to advise his client, which is a mischief judges ought to prevent. 2 Wms's Rep. 673. Mich. 1734.

See And. 189.

Thompson v. Thornton. — 2 Roll. Rep. 424. in the Serjeant's case.

4. In several cases the intent in devises shall make estates pass contrary to the rules of common law in deeds or other gifts; and for this see Pl. C. 414. Mich. 13 & 14 Eliz. Per Harpur J. in case of Newys v. Larke.

S. C. cited Bulst. 192.

5. Words in wills ought to receive such favourable exposition, that the intent of the testator apparent in the will shall be performed in every point, and no jot, [or not the least part of it] shall be countenanced. And to this purpose it is the office of judges to marshal the words of wills, and the rather because for the most part wills are made in extremity, and when there is no counsel in the law ready or present, and the testators themselves are not for the most part learned in the law, nor know how to place words in good order, and consequently their ignorance and simplicity require a favourable

favourable interpretation of their words in wills. Pl. C. 540. b. Arg. Hill. 21 Eliz. in case of Paramour v. Yardley.

6. *Averment* to take away *surplusage* is good, but not to encrease, that which is *defective* in the will of the testator; as where the clerk writes to J. S. and his heirs, instead of to the heirs of J. S. that is *surplusage*. But if vice versa, it is enlarging. Per Anderson Ch. J. Godb. 131. pl. 149. Hill. 29 Eliz. C. B.

7. It is the usual course in the construction of wills to consider all the clauses of the will, and to judge upon all the words of the will, and not upon one part only; per Periam J. Le. 229. in pl. 301. Pasch. 31 Eliz. C. B.

8. If the *intent* be not apparent out of the words, then the words are to be expounded by the *common-law*. Cro. E. 743. pl. 19. Hill. 42 Eliz. C. B. in case of Taylor v Sayer.

intestio must not be *mutila* or *cetera*, &c. 2 Bulst. 179. Mirril v. Nichols. — And such estate as the common law would give upon the like words, such estate passes by the will. See Lat. 40. in case of Daniel v. Upley.

9. A devise may be construed so as to avoid a forfeiture as lessee on condition not to assign it to his wife devises it to his son after the death of the wife; because of the forfeiture this shall not be a devise to his wife, which it would have been had it not been for the forfeiture. Arg. Roll. Rep. 398. cites 43 Eliz. Morton's case.

[182]
3 Bulst.
193. S. C.
cited in
case of
Well and
Harring. —
cited 5 Mod. 102.

10. In conveyances subsequent words may be explanatory of the former, but in wills the first words do actually guide those which follow. Arg. 3 Mod. 82. Pasch. 1 Jac. 2. B. R. in case of Friend v. Bouchier.

will's may explain the premises. Per Gaudy J. 4 Le. 76. in case of Mountjoy v. Barker, cites D. 333. Chapman's case.

11. A will ought to receive construction by a due consideration of the *intention of the testator collected out of all the parts thereof*, so that there be no repugnancy, but a concordancy in all parts thereof. Lane, 118. per Tanfield obiter. Pasch. 9 Jac. in the Exchequer.

12. Sentences transposed to preserve the meaning of a will. Hob. 75. pl. 93. Hill. 11 Jac. Spark v. Purnell. See Pl. C. 523. 2. Welkilen v. Elkington, and 540. b. Paramour v. Yardley. — 2 Roll. Rep. 424, in the Serjeants case. — Per Croke J. 2 Bulst. 178. — 3 Bulst. 103. 105.

13. There are three rules. 1st. No will ought to be construed per parcelas, but by entirities. Secondly, To admit of no contrariety, or contradiction. Thirdly, No nugation, nor any nugatory thing ought to be in a will. Per Croke J. who said these rules observed will open all the doors in every will. 2 Bulst. 178. Hill. 11 Jac. in case of Mirril v. Nicholls.

14. Wills and the construction of them do more perplex a man than any other learning, and to make a certain construction of them, this excedit juris prudentis artem; but I have learned this good

good rule always to judge in such cases as near as may be and according to the rules of law; and in so doing I shall not err, and this is a good and a sure rule, if a will be plain then to collect the meaning of the testator out of the words of the will. Per Coke Ch. J. 2 Bulst 130. Mich. 11 Jac. in case of Roberts v. Roberts.

3 Bulst. 107. 15. These rules are to be observed in the exposition of wills. in case of Blamford v. Blamford. S. C. & S. P. by Coke Ch. J. 1st, The *intent* of the devisor. Secondly, The *intent within the will according to the law*. Thirdly, the *scope* of the will should be enquired. Fourthly, It should be interpreted, that *every word may have its effect*; for it shall not be intended he would speak contrary things. Roll. R. 319. Hill. 13 Jac. B. R. Per Coke and Doderidge in the case of Blandford v. Blandford.

As if an alien is made denizen, and lands are given to the alien and his heirs, remainder to B. this is a good estate tail to him, because he can have no other heir but lineal, and not collateral. 3 Bulst. 195. Arg.—3 Le. 111. Trin. 26 Eliz. Per Manwood Ch. B. in construction of wills, all the words of the will are to be compared together, so as there be not any repugnancy between all the parts of the will, or between any of them, so that all may stand.

17. These words in a will, viz. *I purpose to devise* is all one as if I said, I do devise; for whatsoever may be taken to be the will of the testator is his will. Arg. 2. Roll. Rep. 477, 478. Mich. 22 Jac. B. R. in case of Hurd alias Hind v. Foy.

[183] 18. Intent ought to be taken out of the *words* and not upon *averment*. Lat. 40. 42. 137. Trin. 2 Car. Daniel v. Upley. This rule is always to be intended where the intent of the party, by the words contained in the will, may be known; otherwise not. 2 And. 134. pl. 81. Hill. 42 Eliz. — By law no intent of a will ought to be averred contrary to the words of the will. Godb. 411. pl. 496. Pasch. 3 Car. Arg. cites 5 Rep. 68. Cheyney's case. — 8 Rep. 95. b. S. P. in Manning's case. — 4 Le. 76. S. P. Arg. — 1 Salk. 235. — 2 Bulst. 177. — 9 Mod. 159. Barker v. Eyles and Smith.

19. If the intent be *indifferent*, it shall be taken over the rules of conveyances. Lat. 136. Trin. 2 Car. per Whitlock J.

And. 197. 20. A will shall not be allowed or favoured that is *repugnant* in itself, nor, 2dly. to *cross ground in law*; per Doderidge J. Lat. 42. 137. Trin. 2. Car. Manchel v. Dogington, alias Mitchel and Dunton. — 12 Mod. 279. &c. Pasch. 11 W. 3. in C. B. per Blincoew J.

21. An *uncertain* will is *void*; Per Doderidge J. Lat. 137. Trin. 2 Car. in case of Daniel v. Upley.

Sky. 276. in case of Heatle v. Green. — 22. A *general clause* in a will ought not to prejudice a *particular devise*; Per Cur. Chan. Rep. 145. 16 Car. 1. Nevill v. Broughton 391. in case of Olive v. Tong.

See Gibb. 234. per Trevor Ch. J. in deli- 23. You shall make constructions of wills *according to estates at common law by deed*, unless something in the intent of the will appear to the contrary. Cart. 5. Mich. 16 Car. 2. C. B. Bridgman

man Ch. J. in delivering the opinion of the court cites it as a rule laid down, 6 Rep. 16. in Wild's case.

vering the
opinion of
the court,

in the case of Arthur v. Bockenham.

24. The meaning of a testator is to be spelled out by little hints; per Hale Ch. J. Arg. Vent. 30. Mich. 24 Car. 2. B. R.

25. Where a certain and determinate time is appointed for the payment of a legacy, and after a contingent clause is added touching the same legacy, all the words of the will must stand together, which can never be unless the contingency happens within the period of time appointed for payment of it, for if it happens after the time it is vain and idle and cannot controll the property of a personal chattle, or of money executed by payment. Fin. R. 27. Mich. 25 Car. 2. Clent v. Bridges.

26. Where the intent is secret and not declared, the secret intent must give way to the legal intent. See Chan. cases 239. Mich. 26 Car. 2. in case of Cox v. Quaintock.

27. A will shall be good as far as it may, though it may not hold so far as testator intended it; per Ld. Keeper. Fin. R. 159. Mich. 26 Car. 2. Nurse v. Yarworth.

2 Mod. 8;
S. C. in
Canc. —
No part

shall be holden void if by any means it may take effect. Per Gawdy J. 2 Le. 43. pl. 57. in case of Inchly v. Robinson. 3 Le. 163. S. C. & S. P. by Gawdy. — And. 197. Arg. in pl. 232.

28. A will was allowed to work by fractions, by severing a term to attend the inheritance, and making it a term in gross in favour of an heir unintendedly disinherited, being an infant en ventre sa mere, and only for want of a sufficient description. Fin. R. 159. Mich. 26 Car. 2. in the case of Nurse v. Yarworth.

2 Mod. 8,
9. S. C. in
Canc. de-
creed ac-
cordingly.

29. The devise of a trust is not governed by 32 H. 8. and therefore, and because of several accidents which cannot be foreseen, chancery doth sometimes dispose of trusts according to the presumptive intention of the parties. Fin. R. 159. Mich. 26 Car. 2. Nurse v. Yarworth.

30. Estates transposed to maintain the intent of a will. 2 Chan. [184] cases 10. Mich. 31 Car. 2. Green v. Hayman.

1 Salk. 234.

S. P. — 3 Bulst. 122. — Brownl. 147. Ailet v. Choppin. S. P. — Cro. E. 9. Anon. — Pl. C. 523. Welkden v. Elkington.

31. It is a general rule, that a will shall never be construed to disinherit an heir at law unless such implication be necessary, and not only constructive and possible. Raym. 453. Mich. 33 Car. 2. B. R. per Raymond, and quotes 13 H. 7. 17. Br. Devise 52.

32. Where there is construction against construction, and not construction against the letter of the will, equity will favour the next of kin before a devisee that is more remote. Vern. R. 5. pl. 2. Pasch. 33 Car. 2. Winn v. Littleton.

The case
was that W.
seised of
lands in
fee, and
having

lands also mortgaged to him, devised all his lands to J. S. who was not his next of kin; and L. who was the next of kin took out letters of administration, the court decreed the administrator to have the mortgaged lands. Ibid. — 2 Chan. Cases, 51. S. C.

33. Devise to his wife for life if she do not marry, but if she do marry, that H. presently after her decease enter, have and enjoy all the land to him in tail, the remainder over. The construction of

Raym. 427.
Brown v.
Cutter.
S. C. and

resolved it is not a contingent remainder, but an immediate devise; because, should it be contingent, the devisors intention would be destroyed; and judgment accordingly. — a Show. 152. pl. 134. S. C. adjudged accordingly.

34. *The same word in the same will is of the same sense.* 2 Chan. Cases 169. Mich. 36 Car. 2. Whitmore v. Ld. Craven.

35. The words (*estates granted*) in a will were construed as if it had been *agreed to be granted.* 1 Salk. 225. pl. 2. Mich. 5 W. & M. in B. R. Milford v. Smith.
Show. 350. S. C. by name of Winsford v. Smith, held accordingly. — 4 Mod. 131. S. C. adjudged.

36. No implication is to be received against *express words.* 1 Salk. 226. pl. 4. Hill. 5 W. & M. in B. R. Goodwright v. Cornish.
See *ibid.* 227, the argument of Powell J. — Cro. E. 498. Baron v. Hill.

37. The words (*heirs of the body*) cannot in the same clause of a will be construed words of limitation as to lands, and as to goods to be words of designation of the person only intended to take the goods; per cur. 2 Vern. 324, 325. pl. 314. Mich. 1695. Richards v. Lady Bergavenny.

38. Devise of land to A. during her widowhood, or till such time as B. her eldest son shall be 21, and then to B. and his heirs for ever paying to his son C. and his daughter D. 40l. a-piece, and failing the said B. to come to C. and his heirs for ever, and failing C. to come to D. and her heirs for ever, and failing B. C. and D. to come to his brother E. H. and his heirs for ever. This word (*failing*) extends as well to failing of payment of the money, as failing of heirs or issue of B. and it is estate tail in B. with remainders in tail to C. and D. remainder over in fee to E. H. Lutw. 804. 813. Trin. 8 W. 3. Whally v. Read.

39. Collateral papers, letters, and sayings of testator, cannot be taken notice of to influence the construction of a will; for that would be to let them in, and make them part of the will itself, and by the statute of frauds and perjuries every part of a will must be in writing, but before that statute, where a will was in writing, no collateral proofs by papers or words could be admitted, because a will was a complete and consummate act of itself, therefore it must be construed by itself. 1 Salk. 232. pl. 10. Hill. 9 W. 3. in Canc. Bertie v. Falkland.

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40. The construction of will is more favoured in law to fulfil the intent of the testator, than any deed or conveyance executed by him in his life-time. Therefore, where a man by deed gives land to W. R. and his assigns for ever, this is only an estate for life; but in a will these very words make an estate in fee. So a devise to W. R. being his eldest son, and his heirs, after the death of his wife, this is a good estate for life by implication in the wife; but it is not so in a deed. Now per Holt Ch. J. The reason of this diversity is not only, that the testator is intended to be ineps consilii,

but because a devise is not a conveyance by the common law, but by the statute; it is true, there were devises before the statute of H. 7. but those were not by common law, but by custom, as in cases of burgrave-lands; now as custom enabled men to dispose their estates in this manner, contrary to the common law, so it exempted this kind of conveyance from the regularity and propriety required in other conveyances; and thus it came to pass, that wills upon the statute in imitation of those by custom, gained such favourable construction. 3 Salk. 127, 128. pl. 10. Hill. 12 W. 3. B. R. Fisher v. Nicholls.

41. Matter that cannot appear till found, when found is not to be regarded in the exposition of wills. 1 Salk. 235. Per Holt Ch. J. Hill. 1 Ann.

agreeable to law. Brownl. 129. Hill. 10 Jac. Coroner v. Clerk. — Hob. 32. Clark. S. C. & S. P.

The intent of a will must be certain and Counden v.

42. Words in a will that are good sense are not to be transposed, otherwise if nonsensical. Per Holt. 1 Salk. 236. pl. 13. Hill. 1 Ann. B. R. Cole v. Rawlinson.

43. Where a devise to an heir gives the same estate that would descend, nihil operatur, and is void. Agreed per Cur. 1 Salk. 242. pl. 3. Hill. 1 Ann. B. R.

two daughters, who are his heirs, makes them joint-tenants. D. 350. b. pl. 20. (bis) Pasch. 18 Eliz. Anon. — And. 50. pl. 125. Mich. 16 & 17 Eliz. Eden v. Harris. S. P. and seems to be S. C. — Bendl. 257. pl. 271. S. C. and the pleadings.

3 Le. 28.
S. P. by
Catline. —
Devise to

44. Where a particular estate is expressly devised, a contrary intent is not to be implied by subsequent words. 1 Salk. 236. pl. 14. Hill. 2 Ann. in Canc. Popham v. Bamfield.

Nor shall
be controlled by
it. Per

Walmsly J. 2 Le. 42. in case of Inchley v. Robinson. — 3 Le. 167. — D. 33. pl. 20.

45. A native of Holland possessed of a personal estate both there and in England, making his will in Holland, how it must be construed so as to take effect, notwithstanding the difference of the laws of each country. See Chan. Prec. 577. pl. 349. Mich. 1721. Bowaman v. Reeve.

46. The common and legal sense of the words shall be taken, if the contrary be not plainly and necessarily implied. 1 Salk. 238. Hill. 7 Ann. C. B. Aumbl. v. Jones.

47. Where a will was wrote blindly, and hardly legible, and the money legacies writ in figures, and some seemed to have been altered, so that it was difficult if not impossible to read them, or to distinguish what the legacies were, and particularly in one place, whether 100l. or 300l. was meant, it was ordered by the Master of the Rolls to be referred to a master to examine, and see what those legacies were, and the master to be assisted by such as were skilled in the art of writing. Wms's Rep. 425. Pasch. 1718. Masters v. Sir Harcourt Masters.

48. A. having lived long in Canterbury and died there, gave by her will 50l. to the poor of the two hospitals in Canterbury, (naming them) and afterwards by a codicil gave 5l. a year to all and every the hospitals, (not saying where the hospitals were). Besides the two hospitals in the town, there was an hospital out of the town about

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a mile, founded by the same archbishop, and governed by the same statutes. The Master of the Rolls *confined the general words (all hospitals) to those in Canterbury*, and the rather, *because if extended further, they would create a deficiency, and so in a great part defeat the rest of the will* as to plain legacies, in favour of doubtful ones. For the 5l. per ann. would be perpetuities to whatever hospitals it should be decreed. Wms's Rep. 421. 426. Pasch. 1718. Masters v. Sir Harcourt Masters.

49. A word *mis-wrote* in a will, as (*dying with issue*), for (*without issue*) must be taken in that sense, which makes the will consistent with reason, and good sense. 8 Mod. 59, 60. Mich. 8 Geo. 1. Burr v. Davall.

50. Clauses seemingly *contradictory* shall be construed so in a will as to make *all consist*, as where a devise is of legacies to several persons, and to grand-children to be *paid at their respective ages of 21, or marriage*, and after by a subsequent clause he appoints that all the legacies thereby devised shall be paid *within one year after his decease*; the last clause shall refer to the legacies to the other person only, and the first clause to the grand-children only. 9 Mod. 154. Trin. 11 Geo. in Canc. Adams v. Clerk.

So may
loose words
which
would frustrate
the intent of the
testator.
Per Holt

51. No words are to be *rejected* which may be reduced to bear any legal construction; it is true, if any words are *contrary to law*, or *insensible*, those must be rejected, as where a devise of land is to two, and the survivor and survivors of them, there the word (*survivors*) shall be rejected. Per King C. 9 Mod. 159. Trin. 11 Geo. in Canc. Barker v. Eyles and Smith.

Ch. J. in delivering the opinion of the court. 6 Mod. 112. Hill. 2 Ann. B. R. Countess of Bridgewater v. Duke of Bolton.

52. There is a *diversity where a will passes a legal estate, and where it is only executory, and the party must come into Chancery in order to have the benefit of the will*; in the latter case the intention shall take place, and not the rules of law; per Ld. C. King. 2 Wms's Rep. 471. Trin. 1728. (Hill. 1731.) in case of Papillon v. Voice.

53. One devises the *surplus of his personal estate to his 4 executors*; this is a *joint bequest*, and on the death of one shall go to the survivors, as well in the case of a legacy as of a grant. 3 Wms's Rep. 115. Trin. 1731. in case of Willing v. Baine.

54. All wills and deeds must stand as they did at the time of making them and *cannot be made good by any after act*, especially where such act is *collateral, and is, upon its happening, such a contingency, upon which no estate can commence by law*. Per Ld. C. Talbot. Cases in Chan. in Ld. Talbot's time. 26 Pasch. 1734. in case of Clare v. Clare.

55. The devise of a *trust* is to be construed in the *same manner as that of a legal estate*, and not to be varied by subsequent accidents. 3 Wms's Rep. 259. Pasch. 1734. Atkinson v. Hutchinson.

56. If a will is *general, and that taking his words in one sense will make a complete disposition of the whole, whereas taking them in another will create a chasm*, they shall be taken in that sense, which is most likely to be agreeable to his intent of disposing of his whole estate [according

[according to the introductive words of the will, which were (as touching my worldly estate, &c. I give, devise, and dispose of the * same in manner following, &c.)] Per Ld. C. Talbot. Cases in equity in Ld. Talbot's time, 161. Mich. 1735. in the case of Ibbetson v. Beckwith.

57. The ordinary rule in the construction of wills is, that *where a former clause in a will is express and particular, a subsequent clause shall not enlarge it*; per Ld. Chancellor. Barnard. Chan. Rep. 261. Mich. 1740. Roberts v. Kiffin.

(F. a. 2) Construction. Contrary to the Words to make the Will take Effect according to Testator's Intention.

1. A. Had issue two sons, and devised Black-Acre to the eldest, and if he dies without issue, or within the age of 21 years, that it shall remain to the youngest. A. died; the eldest son had issue a daughter, and died within the age of 21. Adjudged by this word (or) shall be taken for the word (and) by reason of the intent of the devisor. Arg. 2 Roll. Rep. 282. cites 27 Eliz. C. B. Sole v. Gamman.

2. If a man hath issue three sons, and devises land to the eldest in tail, remainder to the second in tail, remainder to the third in fee, and the eldest dies, having issue in his father's life-time, his issue shall have it without a new publication, because the intent of the devisor was not to disinherit any of his sons, and it may be, he did not know of the death of his eldest son, who was, peradventure, beyond seas, or elsewhere absent; and there is not any reason to make such a construction as to disinherit his issue, for by such means many may be disinherited, and the will is expounded against the intent of the devisor. But of such a devise to a stranger, it may perhaps be otherwise; for the devisee being dead, the intent of the devisor doth not appear to carry it from his own heir to the heir of a stranger; per Popham, Ch. J. Cro. E. 424. pl. 20. Mich. 37 & 38 Eliz. B. R. in case of Fuller v. Fuller.

3. A man devises a rent-charge of 50l. per annum to his wife and his son for their lives, and the life of the longer liver of them; and that after the son shall attain the age of 13 years, he shall have 20l. a year out of this rent for his better maintenance during his mother's life. This is a devise of an entire 50l. per annum to the feme until the son shall attain this age, and after they are several rents, and not one joint-rent; for if the testator had intended the rent to be joint, then this clause would have been absurd. For if the rent was joint, then the son should have 25l. a year, being the moiety of the said rent of 50l. But the testator said, the son should have 20l. a year pro meliori manutentia, whereas this would be pro deteriori manutentia sua, if the rent should be construed to be joint; per, Cur. Saund. 282. 284. Trin. 21 Car. 2. Duppa v. Mayo.

S. C. adjudged a joint-tenancy, by reason of the contingent remainder. 21 Mod. 108, 109. S. C.

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4. A. devised all his estate to his two nieces J. and E. to be equally divided between them during their lives, and after the decease of them two, then to the heirs of J. The question was, upon the death of J. living E. whether J. and E. were joint-tenants by the will, or whether the heir of J. shall have the moiety, now living E. and it was adjudged a joint-tenancy to avoid the hazard of the devise by making it a tenancy in common; for supposing it a tenancy in common, and that E. had died first, Holt J. asked what would become of the moiety? For that a contingent remainder eodem instanti that the particular estate determines is void, and afterwards he delivered the opinion of the court that it was a joint-tenancy. Holt's Rep. 370, 371. Pasch. 6 Ann. Tuckerman v. Jefferies.

(G. a) Averment. As to Wills before the 29th of Car. 2. Cap. 3.

1. IF one devises lands to the heirs of J. S. and the clerk writes it to J. S. and his heirs, the same may be holpen by averment, because the intent of the devisor is written and more, and it shall be naught for that which is contrary to his intent and good for the residue. But if a devise be to J. S. and his heirs, and it was written but to the heirs of J. S. there an averment shall not make it good to J. S. because it is not in writing, which the statute requires; and so an averment to take away surplusage is good, but not to increase that which is defective in the will; per Anderson Ch. J. Godb. 131. pl. 149. Hill, 29 Eliz. C. B. Anon.

2. In an assise of novel disseisin by A. against B. it was given in evidence at the assise that W. B. was seised, and having issue two sons and two daughters, devised his lands to his younger son in tail, and for want of such issue, to the heirs of the body of his eldest son, and if he dies without issue, that then the land shall remain to his two daughters in fee. W. B. dies, the younger son dies without issue, living the eldest son, having issue him who is tenant in the assise. The tenant produced witnesses, who affirmed upon their oaths, that the devisor declared his meaning concerning the said will, that as long as the eldest son had issue of his body, that the daughter should not have the land, but the court utterly rejected the matter; and judgment was given for the plaintiff. 2 Le. 70. pl. 94. 29 Eliz. Challoner v. Bowyer.

S. C. cited per Raymond J. and said, that had the evidence not been rejected, no man could advise his client, or know the certainty of any will; for if contrary to, or otherwise than

what appears written, might be averred, one will would appear in writing, and quite another upon evidence. Raym. 410, 411. in case of Stead v. Berrier.

So in P. Lutw. 714. Lawrence v. Dodwell, where in dower the

3. If a man devises land to his wife for life generally; this cannot be averred to be for her jointure and in bar of her dower, because a devise imports a consideration in itself, and an averment shall not be allowed where the intent of the testator cannot be collected out of the words of his will, 4 Rep. 4. 2, cites it to be resolved by the

the two Ch. Justices and all the court in Mich. 38 & 39 Eliz. defendant pleaded in bar, that in the court of wards, in the case of * Leake and Randall.

the husband had devised lands to the demandant durante viduitate sua, and averred that it was in recompence of her dower; per Treby Ch. J. this is an averment de-hors the will, if it had been alleged that the devise to the demandant was for her jointure it had been good, though the word jointure be not in the will, if there be other words tantamount. Powell J. taking notice of this case of Leake and Randall, as cited in 4 Rep. said he was not satisfied with the reason there given, that the averment was not good, because a devise imported a consideration in itself, but that the true reason is that no averment is to be made, because the will ought to be wholly in writing, and the intent of the testator only to be collected from the words thereof.

4. No averment can be upon a *will to supply an use or trust of land*; for a will of land deviseable by the statute ought to be in writing, and if the trust be not in writing it is to be rejected by force of the statute of 32 H. 8. cap. 1. of wills. Jenk. 115. pl. 26. cites 4 Rep. 1. [4. a. by the reporter in] Vernon's case.

5. A. hath issue *two sons, both named John*, and conceiving his eldest son to be dead, he *deviseeth his lands by his will to his son John generally*, when in truth the eldest son is living; in this case the younger son may allege and give in evidence the devise to him, and may produce witness to prove the intent of the father; and if no proof can be made, the devise shall be void for the uncertainty. Resolved by Anderson and Wray Ch. J. 5 Rep. 68. b. Mich. 34 Eliz. in Cheyney's case. [189]

6. I give to Kath. my wife all the profits of my house and lands lying in the parish of Birling and L. at a certain street there called Brook-Street. Upon a special verdict it was found, that there was not any village or hamlet called Birling in the said county, and that the land, supposed to be devised, lyeth in Birling-Street; but no man's verbal averment here shall be taken or admitted to be contrary to the will, which is expressly set out in the will. 1 Brownl. 132. Trin. 6 Jac. Pacy v. Knollis.

7. A will is made, and A. is made executor and no trust is declared, and *testator at his death declares*, that his will is for the benefit of his children. Hyde Ch. J. asked if this *intent* might not be averred, and said, nothing was more common. And per Doderidge J. For the *making an estate* you cannot aver otherwise than the will is, but as to the *disposition of the estate* you may aver. And per Jones J. the reason of Cheney's case 5 Rep. is, that whoever will devise lands ought to do it by writing, and if it be without writing it is out of the will, though his intent to be otherwise. Godb. 432. Pasch. 3 Car. 2. B. R. in case of Evers v. Owen.

8. An averment of a will not good by law, yet *good in equity*, and the intent of a will allowed. Toth. 286. cites Peacock v. Glascock. 6 Car. 11. B.

9. A *trust* may arise by parol, and the executor may be a trustee by the will of the testator, though not mentioned in the will. N. Ch. R. 135. 21 Car. 2. Pory v. Juxon. A trust shall never be averred where no

such thing appears in the will. Fin. R. 313. Trin. 29 Car. 2. Puleston v. Puleston.

(G. a. 2) Averment, or Parol Evidence, allowed in what Cases to explain or supply Defects in Wills since 29 Car. 2. Cap. 3.

1. **T**HOUGH a parol averment shall not be admitted to explain a will, so as to expound it contrary to the import of the words, yet when the words will bear it, a parol averment may be admitted, as 5 Rep. 68. to ascertain the person, but in no case to alter the estate; per North and Atkins. Freem. Rep. 292. in pl. 343. Trin. 1677. in C. B. in case of Steede v. Berrier.

2. The father of the plaintiff and defendant devised his estate to E. his eldest son, with a remainder to his first, second, and third son, and for default of such issue, to his second son H. with remainders to his first, second, and third sons; and so to his third son, &c. Provided that if E. when he enjoyed the estate should have no issue male living, that then he should pay 40l. per annum for the maintenance of the eldest son of H. and for his education, in such manner as was fit for his degree, until his eldest son should have a son produced and living. E. the eldest son had issue a son, who lived three days and then died; it was in proof that the testator did declare that his intent was, that this 40l. per annum should be paid in case E. should have a son born that should die suddenly after. Per Cur. the annuity is determined, and a collateral proof shall not be admitted against the express words of the will; and it is probable his intent was, that the 40l. should be continued to be paid, although he had a son which died suddenly after; yet now it must be taken upon the words of the will, and an averment of the intent of the party contrary to his express words shall not be received, and so decreed against the plaintiff. If it had been a trust, the intent might have been supplied by proof; per Cancellar'. 2 Freem. Rep. 52, 53. pl. 60. Pasch. 1680. In curia Canc. Chamberlaine v. Chamberlaine.

3. One may averr the trust of a personal estate. Per Ld. Chancellor. Vern. 30. Hill. 1681. Fane v. Fane.

4. A. had freehold and copyhold land, and makes his will in these words; *I give all my estate of what kind soever, not before-mentioned by me to my wife, whom I make my executrix*; and it was held the copyhold land did pass, not by force of the words alone, but because it appeared that he had made a surrender of the copyhold estate before to the use of his will. 12 Mod. 594. in case of Shaw v. Bull, cites Mich. 32 Car. 2. Rot. 473.

5. A. made his wife executrix, whereupon the son by several insinuations gets his mother to prevail on his father to make a new will, and himself named executor, declaring he would only be executor in trust for her. It appearing to be a fraud as well as a trust, North K. decreed it notwithstanding the statute of frauds, though

Chap Prec.
3. Hill.
1697. De-
venish v.
Baines. S.
P. as to a

no trust was declared in writing. Vern. 296. pl. 290. Hill, 1684, copyhold estate, which to.

stator intended to give to his godson, but was persuaded by the wife to give it to her, and pronounced that she would give the godson the part assigned for him, and decreed against the wife, notwithstanding the statute of frauds.——And. ibid. 4. in S. C. cites CHAMBERLAIN'S CASE, where a son and heir apparent persuaded his father not to make a will which he intended to make, and thereby to make certain provisions for his younger children, promising that his brothers and sisters should have those provisions, whereupon the father forbore to make them, and chancery decreed the heir to make them.

6. A. devised his real estate for payment of his debts and makes his wife executrix, parol proof was admitted to prove *A's declarations, that his executor should have his personal estate discharged of his debts.* 2 Vern. R. 252. pl. 240. Hill. 1691, Countess of Gainsborough v. Earl of Gainsborough, S. C. cited. 2 Vern. 587. in case of Smith v. Goodman. —9 Mod. 10. S. C.

cited.——In relation to a *personal estate* the court will allow of proofs and averments, but they ought to be plain and indisputable to intitle an executor to the surplus. Per Ld. Somers, who cited this case. Wms's Rep. 9. 20 May 1696. Petit v. Smith.

The evidence was not read in this case to make any construction in law. For the making one executor is a gift in law of the personal estate; but to *oust a construction in equity* lately made, that where a particular legacy is given to an executor he shall be ousted of the residue. Per. Ld. Wright. Ch. Prec. 139. Hill. 1700. in case of Bromley v. Jeffries.

7. A. devised land to B. to sell and dispose of for payment of debts, the heir sued for the *surplus* as his by a resulting trust being not disposed of by the will; per Cur. the estate in law being vested in the devisee, he should have been admitted to his proof of *A's parol declaration*, if it had been wanting and necessary. 2 Vern. 253. cited in pl. 240. Hill. 1691. by Hutchins Ld, Commissioner as the case of Crompton v. North. Ld. Wright cited S. C. and thought parol proof sufficient *to rebut plaintiff's equity.* Ch. Prec. 219. Pasch. 1701. Bulstrel v. Parsons.

8. The *surplus* by will was devised to the wife; *avermnt* was taken that she was intended only as a trustee for her son, and that the testator so * declared at the making of the will. And a decree grounded on the proof made thereof. 2 Vern. 254. in pl. 240. Hill. 1691. cited by Rawlinson one of the Lords commissioners, as the case of Kingmill v. Ogle. Chan. Rep. 250. 16. Car. 2. S. C. decreed accordingly. * [191]

9. Plaintiff endeavouring to have the will explained by depositions of witnesses touching what the *testator declared and the instructions he gave* for the drawing his will, per Cur. devises *concerning land* must be in writing and we cannot go against the act of parliament. 2 Vern. 98. Pasch. 1698. Towers v. Moor. 2 Vern. R. 317. Cary v. Bertie. S. P. — Ibid. 339. S. P. Per Holt Ch. J. and says it was so by the statute 32 H. 8. of wills.——12 Mod. 183. Bertie v. Ld. Falkland. S. P.——S. P. by Master of the Rolls. 2 Wms's Rep. 318. Mich. 1725. Bennet v. Davis.

Lands devised to A. in tail, A. died in testator's life, *leaving issue male*, and then the will is *re-published*, the court refused to admit parol declaration of the testator to *prove his intention* that the issue male of A. should take by the will. 10 Mod. 98, 99. Mich. 11 Ann. B. R. Lord Landdown's case. Ibid. 294. S. C. cited.

10. A. makes his will and B. C. and D. executors in trust and for a remembrance over and above their costs and charges he gives 20 s. a piece to the executors; per Cur. the will declaring that the executors were only in trust, and not declaring for whom the trust was, the person may be averred, and two of the executors having by

by their answer confessed the trust, and being likewise fully proved that it was the testator's intent, and that he declared it a trust for the wife; decreed the trust for her with costs against the adversary executor, per Commissioners. 2 Vern. 99. Patch. 1698. Pring v. Pring.

11. *Dower.* The defendant pleads, that the husband was *seised of the land in question, and of other lands in A.* and that he by his will devised the lands in A. to the demandant, for her life, and died, and that the demandant entered into them by virtue of the said devise; and avers that the land devised was devised to her by her husband in satisfaction of her dower; the demandant demurs. Judgment was given for the demandant by the whole court; because the averment being of a matter out of the will, and not contained in it, ought not to be allowed; and that LEAK AND RANDALS'S CASE, 4 Rep. 4. a. being express in point, and always allowed for law, ought not to be questioned at this day. But afterwards upon a bill brought in Canc. by the defendant being heard by the Lord Chancellor Somers, he was of opinion, that in equity such averment of the testator's intent ought to be admitted, and that the wife in such case should not have both her dower and the land devised; and (as I have heard) decreed in this case accordingly. Ld. Raym. Rep. 438. Hill. 10 W. 3. Lawrence v. Dodwell.

12. Sir R. B. having issue only daughters, settled his estate upon trustees to sell, subject, nevertheless to a power of revocation; afterwards upon the marriage of his daughter with the plaintiff by deed reciting that his intent was, that the manor of C. in question should go to the issue male of the plaintiff, he thereby agreed that if the plaintiff should be minded to purchase the same to him and to his heirs, he should have it for 1500 l. to be raised out of this manor but did not mention whether it should be in satisfaction of the 1500 l. agreed to be allowed the plaintiff in case he would purchase the same. But a question arose, whether the plaintiff should be admitted to read witnesses to explain the testator's meaning in that particular? and alleged that it might be so done, the question being only touching the personal estate, though it could not be so in a will touching lands, because by the statute such will must be in writing, and no averment shall be received out of the will, but as to a personal estate it had been so done in my LADY GAINSBOROUGH'S CASE, in this court. To which it was answered, per Cur. that *what was read there was in affirmation of the law upon the will, which was to carry the personal estate to the executor, and that case stood singly by itself.* But in the case of the Ld. Falkland and Cary it was denied that letters should be read to explain the agreement, though it was then insisted on, that letters were writing, and so more certain. And the Master of the Rolls cited the case of LEAK v. RANDALL, in Vernon's case, in the 4 Rep. that a collateral thing devised by a will, could not be averred to be in satisfaction of dower, unless it did appear to be so by the will; but here the 1500 l. devised was not collateral, because it was to arise out of the same land. 2 Freem. Rep. 245, 246, 247. pl. 313. Hill. 1700. Bromley v. Fettiplace.

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13. J. S. having three daughters and several grand-children and great-grand-children, made his will and devised the *surplus* of his estate to be equally divided amongst his three daughters and all his grand-children and great-grand-children, that should be living within two years after his death, and died; and within two years after his death other grand-children were born; the plaintiffs examined witnesses, to prove J. S.'s intent, that none born after his death should take; and the question was, whether they could be admitted to read this proof, and my Lord Keeper was of opinion that such proof might be admitted, so the witnesses were read, but their depositions were only that *J. S. said so or so, or to that effect*, which my lord said, signified nothing, for that makes the witness the judge; and he ought to set down the very words for the court to judge of; but without this proof my lord held, that the words in the will (*within two years after my death*) were to be taken restrictively, and extended to none born after; and decreed accordingly, which decree was affirmed in the House of Lords. Abr. Equ. Cases, 231, Trin. 1700. Dayrell v. Moleworth.

2 Vern. 378. pl. 343. S. C. but S. P. as to the proof does not appear.

14. A. devised his real estate to B. and made B. executor, and wills that out of his *personal estate and a year's profits of his real*, he should pay his legacies and devised 40l. per annum to C. to maintain him at Cambridge; the executor pleaded *plene administravit*, and it was admitted, that the will had made only a year's profits of the real estate liable, but on the evidence of D. that B. promised A. to pay or otherwise A. would have charged his real estate with the payment of it, the real estate was decreed at the Rolls to stand charged with the annuity, and Wright K. on appeal affirmed the decree. 2 Vern. 506, Trin. 1705. Oldham v. Litchford.

The case was, that the testator was making his will, and amongst other things, was directing this gift to the plaintiff to be inserted in

his will, and the defendant being present, desired him not to put it in his will, but said as he was a christian he would take care to see it paid; and thereupon it was omitted in the will. And the plaintiff having preferred his bill for it, it came to hearing before the Master of the Rolls, and he decreed the payment of it, and that it should be charged upon the real estate; and now upon appeal it came before the Ld. Keeper, and it was insisted for the defendant, that there being a will in writing, since the statute of frauds, &c. nothing could be part of the will but what was in writing, and that no executor or administrator should be charged upon any promise unless it were in writing, and that if it had been in the will it would have charged the defendant no farther than he had assets, and therefore it ought to have been decreed out of the assets only, and that there was no colour to charge it upon the land. But the Ld. Keeper was of opinion, and decreed that the defendant should pay it, and the ground he went upon was, that this was a fraud upon the testator and the legatee; and that notwithstanding the statute of frauds and perjuries, this court had relieved in case of a fraud, although there was nothing in writing to charge the party; but he said he could not decree it a charge upon the land; but the Master of the Rolls being in court, said, the reason he went upon to charge the land was, because the maintenance of a poor scholar was a charity, and was within the statute of 43 Eliz. of charitable uses, and it might amount to an appointment within that statute. 2 Freem. Rep. 284, 285. pl. 356. Pasch. 1705. Oldham v. Litchford.

15. In a will the bequest was, *I give my household stuff, as brags, pewter, linnen, and woollen whatsoever, except a trunk under the chamber-window*; the maker of the will was examined as a witness and swore, that the testator directed him to insert all his goods except the trunk, ordered the deposition to be read, as in case of a devise to son John, when he had two sons John, or if the devise had been *his trunk*, when he had three trunks. 2 Vern. 517. Mich. 1705. Pendleton v. Grant.

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16. A.

16. A. on delivering his will to B. to whom he gave almost all his estate, said, *as B. owned before several witnesses*, that if C. (A's eldest son) behaved himself well he might allow him 20l. per quarter; and if he used that well B. might make it 40l. per quarter; decreed 40l. per quarter to C. during life. 2 Vern. 559. pl. 507. Trin. 1706. Kingsman v. Kingsman.

The case was, A. devised lands to B. paying 100l. which he

owed by bond to *Steel*, which was the obligee's maiden-name, but though he knew she was married, yet he forgot her husband's name, which was *Fitch*, and this being proved by the person that drew the will, and another, the payment was decreed accordingly. Ch. Prec. 229. S. C.

The Master of the Rolls said it was a *testamentary question*, and evidence might be received.

17. Collateral proof may be admitted to *ascertain the person or thing described in a will*. Per Cowper C. in an affirmance of a decree at the Rolls. 2 Vern. 593. Mich. 1707. Hodgson and Caldicot v. Hodgson and Fitch,

18. The construction of making a *legacy* to be a *satisfaction*, has in many cases been carried too far, and it is reasonable in such cases to admit of *parol proof as to the testator's intention*. Per Cowper C. 2 Vern. 594. Mich. 1707. Cuthbert v. Peacock,

19. J. B. having had a long acquaintance with D. P. and having 500l. of her's in his hands, married E. and afterwards made an instrument all of his own hand-writing thus, viz. In the name of God, amen. I A. B. of, &c. *do make this my last will and testament for fear of mortality, till I can settle it more at large; and I do give and bequeath the sum of 1000l. unto D. P. to be paid by my executor, administrator, and for sure payment thereof, I do charge all the real and personal estate which I have in the world, I being very desirous to make a provision for the said D. P. for several good reasons inducing me thereunto. In witness whereof I have hereto set my hand this present 7th day of December, 1704.* Signed J. B. and delivered the same unto the said D. P. and about a fortnight before his death, which happened in January, 1704. J. B. did declare he had left with D. P. an unquestionable security for 1000l. charged upon his real and personal estate; and that he had done the same for fear of mortality, till such time as he can make a full and complete will, which he declared he would do so soon as his wife was brought to bed to see if it were male or female. He died suddenly, 6 Feb. 1704. The widow afterwards came to take administration to her husband, and a caveat being entered by D. P. she appeared and pleaded this will or schedule testamentary, and proved by four witnesses what is alleged before. She was also examined on interrogatories, on the prayer of the respondent, on which she deposed that she was married to J. B. 18 July 1700, at his chambers in the Inner Temple, by R. H. since deceased. (But the marriage was not insisted on H. being dead) his hand was proved. The cause coming to be heard before the judge of the prerogative (Sir Richard Raines) he gave sentence against the will, and pronounced that J. B. died intestate, without any will at all by him made. On appeal being heard before the delegates, among whom were Lord Ch. J. Holt, Baron Price, and Judge Dormer,

Dormer, the sentence was reversed, and they pronounced for the will, 2 Ld. Raym. Rep. 1282, 1283. Pasch. 6 Ann. B. R. Powell v. Beresford.

* 20. There is *difference* between a *void devise* and a *doubtful* and *uncertain* one, as if J. S. hath several sons, and a devise is made to one of the sons of J. S. this is entirely void, and can never be made good; but if it be only doubtful and uncertain, it must receive its construction from the words of the will, and no parol proof or declaration ought to be admitted out of the will to *ascertain* it, but in case of *two sons named John*, it is consistent with the words of the will, to admit proof which of them was intended, and the words in the will are not at all altered by it, and this is according to Lord Cheyney's case 5 Rep. And now since the statute of frauds and perjuries, which orders all wills to be in writing, it is much stronger. Per Tracy J. 3 Ch. Rep. 183. Trin. 7 Ann. in Canc. in case of Litton, alias Strode v. Falkland.

2 Vern. 624-725. S. P. by Tracy J. in S. C.—5 Rep. 68. b. in Ld. Cheyney's case.—10 Mod. 100. in Ld. Lanf-down's case.

So where there are two of the name of J. S. of D. and

J. devise land to J. S. of D. parol evidence will be admitted to prove, which J. S. was intended by me. Per Ld. Macclesfield. 2 Wms's Rep. 137. Pasch. 1723. in case of Harris v. the Bp. of Lincoln.

21. A. made his wife executrix, and devised to her the use of his table-plate for life, and after to C. his grandson, and made no disposition of the surplus. Proofs were allowed to be read, *that A. intended to give the surplus to his executrix*, it being to *oust an implication or rule in equity*, but the proofs being slender and uncertain, the court laid them out of the case, and considered it only on the face of the will, and decreed a distribution; per Cowper C. 2 Vern. 648. Hill. 1709. Lady Granvill v. the dutchess of Beaufort.

In this case of the Dutches of Beaufort v. Lady Granville MS. Rep. Upon appeal to the House of Lords, 18th December

1710. The appellant's counsel insisted that it was proved in the cause, that it was the intent of the testator that the appellant should have the surplus of the personal estate to her own use, which proof, as it agrees with the rules of law to preserve the legal title to the executrix, which of common right she has to the surplus, so it shall prevent and ought to rebut the construction of equity, which would create a resulting trust, and make the executrix to be a trustee in equity for the next a-kin, and for these reasons (among others) prayed that the decree might be reversed, and it was reversed accordingly without division.

2 Vern. 673. Mich. 1711. Wingfield v. Atkinson. S. P. and cites the case of * Littlebury v. Buckley, as first decreed in the mayor's court for the next of kin, but on appeal to the House of Lords the *executors were* † admitted to read *witnesses*, to prove the testator intended them the surplus, and on that foot the *lords* reversed the decree.—Wms's Rep. 114. Hill. 1709. S. C. But Ibid. 116. says, that this decree was reversed in the House of Lords.

† But denied where it was in contradiction to the common law. 10 Mod. 99. Lord Lanf-down's case.

* Cited 9 Mod. 10.—2 Vern. 677.—Cited 10 Mod. 99. in Lord Lanf-down's case.

† They held that parol proof ought to be admitted in favour of the executor's title, consistent with the will. S. C. cited in case of Ball v. Smith. 2 Vern. 677. Hill. 1711.

Where an express legacy is given to the executor without any further words, as that it was given for care and pains, &c. parol evidence may in such case be admitted of testator's intention, but not where following words declare a trust. Per Powis J. in chancery in the absence of the Ld. Chancellor. 2 Wms's Rep. 161. Trin. 1723, in case of Rathfield v. Careless.

22. A. sent for B. to make his will, *who took it in characters from his mouth, read it to him, and he approved* thereof. B. the next day brought the will drawn up in four sheets of paper, but the testator was not sensible and died. After the testator's death B. who

B. who drew the will was examined as a witness. 2 Vern. 647, pl. 577. Hill. 1709. *Strish v. Pelham*.

2 Vern. 624. S. C. says, that Tracy J. was clear that no parol proof ought to have been received according to Cheney's case 5 Rep. No proof ought

to supply the words of a will. If a devise be to *one of the sons of J. S.* who has several sons, it is void, and shall not be supplied by parol proof. But the will that must pass the land must be in writing, and must be determined only by what is contained in the written will.

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24. Parol evidence admitted to *prove the intent* of the devisor *where doubtful*. MS. Tab. Feb. 13th, 1710. *Docksey v. Docksey*.

25. Croft the testator devised particular lands to his executors to be sold for payment of all his proper debts, and makes A. and B. his executors, and gave direction to the person who drew the will to give all his personal estate to his executors; but by mistake that was omitted in the will, though proved in the cause by the person who drew the will. Supposing then such parol evidence of the intent of the testator to be good, quære if the personal estate shall be employed in aid, and exoneration of the real estate towards payment of the testator's debts, notwithstanding the particular devise of the personal estate to the executors? As to the parol evidence of the intent of the testator de-hors the will was cited the case of *Littlebury v. Buckley* in Dom. Proc. Harcourt C. said, he must construe the intent of the testator out of the words of the will, and not upon parol evidence in this case. Parol evidence was admitted in *Littlebury* and *Buckler's* case in Dom. Proc. because the parol evidence there was an affirmance of the right at common law in opposition to a presumption in equity, that where the executor hath a specifick legacy, the surplus was not intended to be given to him, but in this case the parol evidence is to controul the common law, and give the personal estate to the executor, which is assets at common law to pay debts. Decree, That the executors account for the personal estate of the testator. MS. Rep. Mich. 12 Ann. in Canc. *Gale v. Crofts & al'*.

26. A. by will gave 500 l. to B. and made B. executor, and made no express disposition of the surplus. The next of kin brought a bill for a distribution. B. answers and waves the benefit of the surplus by mistake of the law in that point, and was denied, by Trevor Master of the Rolls to amend his answer; who decreed, that having waved the surplus by his answer, he should account for it. On appeal to Ld. Cowper, his lordship said, it would do very well if this point concerning the surplus was once settled and certain either way; yet in this case, where the defendant himself

himself had by his answer waved any title to the surplus, he would not, against *his own confession* decree it for him. In Easter term 1718. the cause coming before Ld. C. Parker upon a master's report, his lordship said, he could not but incline to help the defendant [as to other matters in dispute] he being in a way of *losing his right by mistake or misadvice only* of his counsel [as to this point of the surplus.] Wms's Rep. 297, to 300. Mich. 1715. 1718. Rawlins v. Powell.

27. One by will gives his executor an express legacy and makes no disposition of the surplus. The court will admit of parol evidence to shew the intention of the testator, and if proved that the testator intended the surplus to the executor, he shall have it notwithstanding his express legacy. 2 Vern. 736. pl. 645. Hill. 1716. Batchelor v. Searl.

clearly accordingly. —

2 New Abr. 424. S. C. at large in totidem verbis with that of Gilb. Equ. Rep. 125.

Gilb. Equ. Rep. 125. S. C. decreed accordingly — Equ. Abr. 246. pl. 12. decreed

28. Testator devised his estate to the right heirs of his mother, and proof was admitted to shew that he intended it for the right heirs of his grandmother, the estate coming from her family, and this was held *not contrary to the will, and was said to be decreed accordingly. 9 Mod. 10. Pasch. 1722. cited as the case of Harris v. Bishop of Lincoln.

29. Where the will explains itself no evidence *dehors* shall be admitted. Per Cur. 9 Mod. 11. Trin. 8 Geo. Rathfield v. Careless.

30. A legacy devised to Catharine Earnley was claimed by Gertrude Yardley. There were several circumstances in the case to induce a belief that Gertrude Yardley was the person intended; as that there was no Catharine Earnley that claimed this legacy, but it was proved the testator's voice was low and hardly intelligible, that testator usually called the claimant Gatty, which the scrivener might easily mistake for Katy, and that testator for better information who this legatee was directed the scrivener to J. S. and his wife, who declared that Gertrude Yardley was the person intended, and also that testator in his life-time had declared he would do well for her by his will. The Master of the Rolls at first inclined that the legacy was void, but afterwards, upon consideration held it good, being only of a personal thing, but had it been of land it had been otherwise; and he said, that as originally a bequest of a legacy was governed by and construed according to the civil and canon law, so shall it be after the making the statute of frauds, provided there be a will in writing. 2 Wms's Rep. 141. Pasch. 1723. Beaumont v. Fell.

31. A. by will gave 5l. a-piece to her nearest relations, and made C. a stranger sole executor, and gave him 5l. for his care in fulfilling her will, but made no disposition of the surplus. The scrivener who drew the will swore, that A. at the time of making the will declared her intention that C. should have the surplus if any, for that he had been her very good friend, and her relations ungrateful to her, and that her directions to him were to give the surplus to C. which he would have done expressly but that he thought it needless,

S. C. 2 Wms's Rep. 136, 137. Pasch. 1723. Per Ld. Macclesfield, decreed accordingly.

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S. C. 9 Mod 9. by the name of Rathfield v. Careless. states it that the 5l. was given to C. for the care and pains he

might take
in fulfilling
the trust in
her will.

needless, as being only what the law implied. On the other side was some slight proof (as the reporter terms it) that A. had declared her intentions to give the surplus of the personal estate to her next of kin. Mr. Justice Powis (who sat in the Ld. chancellor's absence) took notice that here was *parol evidence on both sides*, and that what the scrivener swore was contradicted by the evidence on the other side, but that there were words in the will declaring the executor to be only a trustee, *5 l. being given him for his care in fulfilling the will*, which would amount to a declaration of trust, and goes beyond all *parol proof*, and decreed a distribution amongst the next of kin, but reserved costs till after the account taken. 2 Wms's Rep. 158. Trin. 1723. *Rashfield v. Careless*.

32. A. having about 10000*l.* in money and upon securities, by will taking notice of what her estate, and that she intended disposing of the same by her will gave pecuniary legacies to every brother and sister and half-brothers and sisters, and to B. her eldest brother 500*l.* and made him executor, but made no disposition of the surplus. Ld. C. Macclesfield said it was necessary that the rule of property should be known, fixed, and certain, that people might know which way to steer, and that the court had frequently allowed *parol evidence* in favour of the executor to prove testator's intention, to rebut that equity which otherwise would be in favour of the next of kin, and cited the Lady Gainsborough's case, and the obstinacy of the drawer, for which the executor ought not to suffer, and owned that it was dangerous to allow *parol evidence* in case of discourses at a time different from that of making the will, but that abstractedly from that case it has been admitted. 2 Wms's Rep. 210. Hill. 1723. D. of Rutland v. Dutchess of Rutland.

[197] 33. In Canc. Pasch. 9 Geo. coram Ld. Chanc. A man devised lands to two persons and their heirs in trust, to pay some annuities, &c. and he willed, that what remained should go to his heirs for ever on the part of his mother. N.B. This estate descended from the grandmother to his mother, and from her to him. The question was, whether he who was heir of the mother's side by the grandmother should take, because he had also an heir on the mother's side by the grandfather. Ld. Chanc. admitted *parol proof* to be given of this, that he designed the heir by the grandmother, the estate coming from her. A devise was to a son by name, and his christian name was mistaken, but it being added, such a son in the service of the Duke of Savoy, *parol evidence* was admitted, and this son, though his name was mistaken, had the estate. So if two persons of the same name father and the son, it shall be intended of father, but evidence may be admitted to prove which was meant. 2dly. These words (shall go and come to my heirs a parte materna) are no more than a declaration that the trustees should not take, and the lands shall descend according to the old uses, as if these words had not been in the will. Otherwise, if I devise to A. and his heirs, to the use of B. for life, remainder to C. in tail, without making any disposition of the remainder in fee, then this remainder shall go to A. for the estate was given to A. and his heirs, and he shall have all except what was particularly limited to B. and C. so that these words do amount

amount to a declaration that the two devisees shall not take this remainder; but if there are words in a devise which expresses that the devisee shall be only a trustee for paying debts or the like, as where an estate is directed to be sold for that purpose, there they shall have nothing but under the execution of the trust, and the surplus shall result back to the heir, as part of the estate undisposed of. He remembered, and was of counsel in case of *Abbot v. Burton*. Hob. and other books were denied for law about their notion of the old use; and in this case the remainder in fee had gone to the devisees, had not the deviser declared that it should go in such manner as the law had limited. But this will would have had another construction if there had been any alteration of the old use by a settlement, the bill being to have an execution of the trust. Decree that trustees should convey to the grandmother's heir.

34. A. devised *all her household goods* to J. S. and the surplus of her personal estate, &c. to J. N. Upon a reference to a master, and upon whose report the cause came on, whereby, though it reported manifest intentions and declarations of the testatrix that she did not intend her plate should pass, yet the master certifying that the plate *was commonly used in the house*, the Master of the Rolls rejected all the evidence touching the intention of the party, there being a *compleat and plain will in writing, which must not be altered or influenced by parol proof*. 2 Wms's Rep. 419. Trin. 1727. *Nicholas v. Osborn*.

35. A *presbyterian who had three infant daughters bred up that way, and had three brothers presbyterians, makes his will, appointing his brothers and also a clergyman of the church of England guardians* to his three infant daughters and dies, *having sent his eldest daughter to his next brother; the clergyman gets the two other daughters into his custody, and places them at a boarding school, where they were bred according to the church of England, and brought his bill to have the eldest daughter placed out with the other daughters; the three brothers that were presbyterians brought their bill to have the two daughters delivered to them, offering parol evidence that the testator directed and declared he would have his children bred up presbyterians*. The court declared no proof out of the will ought to be admitted in the case of a devise of a *guardianship*, any more than in the case of a devise of land. The Lord Chancellor would do no more than direct the master to inquire whether the school in Hampshire, at which the two younger children were placed by the guardian the clergyman, was a good and proper school for their education, giving liberty to all parties to apply to the court as there should be occasion. 3 Wms's Rep. 51. 53. Trin. 1730. *Storke v. Storke*.

36. A bill was brought by the plaintiffs as next of kin to the deceased against the defendants as executors, in order to have a distribution of the residuum of the personal estate amongst them. The defendants set forth in their answer a clause of the will whereby the testator gave the residuum of this estate to the poor of the parish of K. in the county of L. Upon this the parties joined in commission, and now the fact disclosed upon the commission, and stated by counsel for the defendants was, that this parish of K. was not in the county of L. but in the county of

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N. and likewise that the testator really thought that this residuum of the personal estate would not amount to above 10 l. and that he declared so at the time of making his will, whereas in truth it amounted to near 1000 l. The Master of the Rolls declared his opinion to be, that parol evidence ought to be admitted to help out the description of the parish in this case, and that this was a settled rule in equity; for which reason he was of opinion, that the parish of K. in the county of N. were well intitled under this will; but he was of opinion that parol evidence ought not to be admitted in relation to the quantity of the thing devised; and therefore he thought the parish was well intitled to the whole, accordingly dismissed the bill. Ex relatione. 2 Barnard. Rep. in B. R. 118, 119. Hill. 5 Geo. 2. 1731, at the Rolls. Brown & al'. v. Langley & al.

37. Where the wife was made executrix, and a considerable legacy devised to her, yet the proof being strong that the testator intended the surplus to her own use, the same was decreed accordingly both at the Rolls and in Chancery. 2 New. Abr. 426. cites Hill. 6 Geo. 2. Hatton v. Hatton.

38. But where A. possessed of a considerable personal estate, made his will, and thereby devised several legacies, but gave none to his executor; and the question was, whether parol evidence ought to be admitted to prove that the testator did not intend that the executor should have the residue of his personal estate; but that the same shall go according to the statute of distributions; and it was held clearly that no such evidence could be admitted, for that this would not be to admit evidence to evict an implication, but was to admit evidence to contradict the rule of law, and what appeared on the face of the will. 2 New. Abr. 426. cites Hill. 6 Geo. 2. Lady Osborne v. Villiers.

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This cause on 26th March 1735 came before the House of Lords on an appeal, and the Ld. Chancellor's decree was affirmed; and the Lords would not allow the parol evidence to be read, nor even the respondent's answer to these matters. Ibid. 243.—There was a division in the House

39. One by will made 23d June 1732, bequeathed to B. the plaintiff, a legacy of 500 l. and all his plate, and to the defendant S. all his leasehold messuages; and after several other legacies and bequests as well as devising some freehold and copyhold lands, he devised as follows, viz. "And as for the rest, residue, and remainder of my estate, whether real or personal, whereof I am seised or possessed, or which I am any ways intitled to, which I have not hereby devised, given, &c. I give and bequeath the same and every part thereof, and all my right, title, and interest therein and thereto unto such my executor, or executors herein afternamed, as shall duly take on him or them the execution of this my will, according to the true intent and meaning thereof, his or their heirs, executors, administrators, and assigns, as tenants in common and not as jointenants." And afterwards appointed the plaintiff and defendant his executors and soon after died; and the plaintiff and defendant proved the will. The defendant at the time of the will made and at the testator's death was indebted to the testator in 3000 l. by bond dated * in 1732, in 6000 l. penalty. A bill was brought to compel the defendant to account with the plaintiff for the testator's residuary estate, and pay him a moiety of the said 3000 l. and interest. And the defendant brought a cross bill to have the bond delivered up to be cancelled.

It appeared by the defendant's answer in the cross cause and by the proofs in both causes, that the testator designed to give this money to the defendant S. and gave the person concerned in drawing the will instructions in writing accordingly; but he refused to mention it in the will, insisting that the bond would be extinguished, and released of course by S's being appointed executor, but the testator appearing dissatisfied with that opinion, a case was stated for counsels opinion, who confirmed the same; in confidence of which the testator signed and published his will with full persuasion that the bond would be extinguished; and this appeared clearly to be the intention of the testator.

of Lords upon the question, whether the evidence should be read or not. The Ld. Hardwick (the present Ld. Chancellor) and four other Lords, were for it but 14 other Lords against it.

Ld. Chancellor held that by considering the will, without the parol evidence, it will appear clearly from the general words of devising the residue viz. *all his real and personal estate, which he had not thereby given; to the residuary legatees*; that this debt which at the time was part of the personal estate falls within the description. The testator was intitled to this debt when he made his will and at the time of his death.

Lord Chancellor said, that he privately thought it was intended that the 3000 l. should go to S. that he privately thought so, but was not at liberty by private opinion to make a construction against the plain words of a will; that none of the cases where parol evidence had been admitted had gone so far as the present case; the farthest they go is to rebut an equity or resulting trust; that the parol evidence in those cases tended to support the intention of the testator consistent with the written will, and did not contradict the express words of the will as in the present case; that it is better to suffer a particular mischief than a general inconvenience, and so* reversed a decree made at the Rolls, and ordered S. to account with the plaintiff B. for the said 3000l. but no costs; this was upon an appeal from the Rolls. Select cases in Canc. in Lord Talbot's time 240. Mich. 8 Geo. 2. Brown v. Selwin.

*His Lordship's opinion, when he was Solicitor General, was

agreeable to this decree; but several others of the greatest reputation and eminence in the law gave opinions very different and strongly for Mr. Selwin.

(H. a). Pass. What Things pass by General Words.

1. **WHERE** a man who has feoffees to his use leases for years, rendering rent, and makes his will, that his executors shall have the profits of his land for 20 years, they shall have the rent; for this is parcel of the reversion, and shall go with it; for cesty que use shall have action of debt, but the feoffees shall have the avowry. Per Fitzherbert and Shelly clearly. Br. Testament, pl. 2. cites 27 H. 8. 12.

2. By the name of the house the orchards, gardens and back-sides will pass. Wentw. Off. of Executors 249.

By the words cum pertinentiis only the

3. *House with appurtenances* will pass *lands belonging to or used with the house*, in a will, though not in a deed. Wentw. Off. of Executors 249.
garden and orchard will pass with the house; but a devise of the house *with the land: appertaining*, will pass lands usually occupied therewith. Per Parker C. Wms's Rep. 600. 603. Hill. 1719. Blackburn v. Edgley.

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4. By the bequest of an *indenture of lease*, the testator's whole *estate in that lease* passes. Wentw. Off. of Executors 249.

5. If one bequeath his *obligation* or other specialty the *debt itself* shall go to the legatee, but by the common law the suit must be in the executor's name, and the debt is recoverable only at common law. Wentw. Off. of Executors 249, 250.

6. By the bequest of *meat, drink and clothing*, or *alimenta*, he shall have, saith the civil law, also *lodging*, habitation, and *all things necessary for the maintenance of life*, viz. as he takes it, *fire, washing, &c.* Wentw. Off. of Executors 250, 251.

7. A man seised in fee *devises houses to his daughter (who was his heir at law) when she should attain the age of 21 years, and in another clause he devises all the rest and residue of his lands to his wife for payment of his debts and legacies; the daughter dies before 21.* Held that the rents and profits of the houses should go to the wife till the daughter should have attained the age of 21 years. Trin. 10 Ann. C. B. Crockford v. Winfell.

8. A. being seised in fee of a small parcel of land by him always employed for producing corn and hay for his own use, and the plowing was done with his coach-horses, and *devised that B. should continue to dwell in his house, and to be at the charge of keeping the house in the same manner as himself did, and the same number of servants and coach-horses, and for that purpose allowed B. 1200 l. a year.* Lord C. Parker decreed, that the lands so before constantly employed and enjoyed, with the house, should continue to be so enjoyed. Hill. 1719. Wms's Rep. 600. 603. Blackburn v. Edgley.

(I. a) By what Words Lands will pass.

S. P. Arg.
10 Mod.
326.

1. BENLOWES serjeant moved this case: a man *seised of lands and tenements in London, devised them by these words; I will and bequeath unto my wife Alice my livelihood in London for term of her life.* By this will the lands in London pass to the wife by this word, livelihood. Nota, for Brook J. said, that it was in ancient time used in divers places of this realm, and had been taken for an inheritance; to which Dyer agreed. Ow. 30. 4 and 5 Ph. and M. Anon.

3 Le. 78.
pl. 118.
Mich. 21
Eliz. B. R.
the S. C.

2. A. devised, that his lands should descend to his son, but he willed, *that his wife should take the profits thereof until the full age of his son, for his education and bringing up*, and died; the wife married another husband, and died before the full age of the son;
and

and it was the opinion of Wray and Southcote, justices, that the second husband should not have the profits of the lands until the full age of the son; for *nothing is devised to the wife but a confidence*, and she is as guardian, or bailiff, for to help the infant, which by her death is determined; and the same confidence cannot be transferred to the husband; but contrary, if he had devised the *profits of the land unto his wife until the age of the infant, to bring him up and educate him*, for that is a devise of the land itself. 2 Le. 221. pl. 280. Pasch. 16 Eliz. B. R. Anon.

in totidem
verbis. —
S. C. cit. d.
Arg. 5 Mod.
102.

3. If I devise *that my executors shall assign my lands to J. S.* the same implicatively is a devise of the lands themselves to my executors; for otherwise they could not assign. Arg. cites the opinion of Wray, Chief Justice. 2 Leon. 165. in pl. 198. Pasch. 25 Eliz. B. R. in the case of the Dean of St. Paul's. [201]

4. So, if I will and devise, *that A. shall pay yearly out of my manor of D. to J. S. 10l.* the same is a good devise of the lands to A. 2 Leon. 165. Pasch. 25 Eliz. B. R. cites it as the opinion of Wray Ch. J. in the case of the Dean of St. Paul's.

5. One *had houses and lands which had been in the tenures of these which had the houses*: and he devised his *houses with the appurtenances*; and it was holden, and so adjudged by the whole court, that the lands did pass by the words (with the appurtenances) for it was in a will in which the intent of the deviser should be observed. Godb. 40. pl. 46. Hill. 28 Eliz. in C. B. Harwood v. Higham.

Mo. 221.
pl. 360.
Higham v.
Harwood.
S. C. argued;
but curia
advise vult.
— Le.
34. pl. 42.

S. C. And by Wray these words (with all the appurtenances) are effectual and emphatical words to enforce the devise, and adjudged that the lands passed.

6. A. having a term of 70 years, devised that B. his eldest son, should have *the use and profit of it for three years, and after C. his second son, should have his lease and term, saving that I will that my wife shall have half the issues and profits of the land during her life, bearing and allowing half the charge thereof*. Per Gawdy and Clench J. she has an interest in the land; for to have the issues and profits, and to have the land, is all one, and so was the intent that she should have the land with the son for her life, and if she has no interest, she can have no action; for account lies not for want of privity. Cro. E. 190. pl. 2. Mich. 32 and 33 Eliz. B. R. Parker v. Plummer.

7. The words (all my lands) in a will will *pass a house*, but the devise of a *house does not pass lands*. Mo. 359. pl. 491. Trin. 36 Eliz. Ewer v. Heydon.

8. A. devised a house with the appurtenances; question was, whether land in a field passed. Popham doubted, but Fenner said, it might pass, and that upon demurrer in 28 Eliz. it was adjudged accordingly. But it appearing upon evidence that the house was copyhold, and the land freehold; the whole court thereupon conceived, that it could not be said appurtenant, although it had been used with it. Cro. 704. pl. 24. Mich. 41 and 42 Eliz. B. R. Yates v. Clinkerd.

Mo. 771. pl. 1066. Kerry v. Derick. 3 Jac. in C. B. The S. C. the court was divided, but at length it was adjudged that it was sufficient to convey the land, and says the defendant was

9. A. *seised of lands in S. in Com. Midd. and of other lands in E. in the county of S. made two several leases for years of them, to two several persons, reserving upon each lease 10l. rent; and after he made his will, viz. As concerning my lands, I give and bequeath the rent of 10l. a year in S. in the parish of E. to my wife M. during her life, and after her decease to my father, and after his decease to my brother G. and if it please God they die without issue then to F. and I. my brethren,* Item, I give to my wife my house and tenements in S. The defendant married M. and after the years expired claimed the lands during the life of the wife; it was conceived in this case, that the word rent was not sufficient to convey land by the statute of wills. Mo. 640. pl. 880. 44 Eliz. Derrick v. Kerry.

advised to bring a writ of error. — Cro. J. 104. pl. 39. Mich. 3 Jac. S. C. Resolved that the land itself should pass by this devise; for it appears, his intent was to make a devise of all his lands and tenements, and that he intended to pass such an estate as should have continuance for a longer time than the leases should endure; and the words are apt enough to convey it according to the common phrase, and usual manner of speaking of some men, who name their land by their rents; wherefore it was adjudged accordingly. — Sty. 308. Mich. 1651. Arg. cites Trin. 3 Jac. Terry's case, [but means S. C.] where a devise of all his rents in tail passed his lands, because in vulgar acceptance it is the rents of lands. — 2 Vern. 400, in pl. 369. S. C. cited by Holt Ch. J. by the name of Cherry v. Dethick, that a devise of a rent was adjudged a devise of the land itself.

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11. A *seised of lands mortgaged them by deed to J. S. and his heirs, upon condition, if A. or his heirs on the 20 October, 1624, paid to J. S. and his heirs 100l. that he might re-enter; afterwards J. S. devised to J. D. all his goods, moneys, bills, bonds, mortgages, and specialties for monies, and made him his executor and died. The 100l. not being paid J. D. entered. Resolved, these words (all my mortgages) made a good devise of the lands mortgaged; and judgment accordingly.* Cro. C. 37. pl. 1. Trin. 2 Car. C. B. Crips v. Gryfill.

12. A devise of his *inheritance* was held a devise of his lands, Sty. 308. cites 8 Car. in C. B. Spurt v. Bent.

13. A man *having lands in fee and lands for years devises all his lands and tenements to A. and the fee simple lands pass only and not the leases, but if he had had no fee-simple lands and only leases, the lease for years would have passed; resolved by all the justices (absente Richardson).* Cro. C. 293. pl. 3. Hill. 8 Car. B. R. the first resolution in the case of Role v. Bartlett.

This case is in Sty. 308. 307. and 319. in the name of Tailor v. Webb, and adjudged accordingly. — 2 Jo. 25. Arg. cites it as

14. *I make Sir Giles Bridges of Wilton my sole ayere and yexecutor* it was agreed that this is good, and shall pass as well the fee simple as the goods and chattles; and as to *the false English* (as this case was) this *shall not defeat a testament when the intent may so plainly appear,* and this point had frequently been argued upon such testament which Sir Giles Bridges had made with his own hands, that he did not well know English words, he being mostly conversant beyond sea. 2 Sid. 75. Pasch. 1658. B. R. Marret v. Sly.

adjudged 13 Car. 2. though the words were "his sole aixe and executorie." — But making one *executor of all his goods, lands and chattles,* will not pass lands of inheritance, though there was no term for years. Per Ld. Cowper, and that the word (lands) in this case ought not to be rejected

jected as useless, for that in all probability there might be rents in arrear of those lands, and by making one executor of his lands, the rents of those lands would pass. Chan. Prec. 471. 473. pl. 296. Pasch. 1717. Piggot v. Penrice. — Gilb. Equ. Rep. 137. S. C. in totidem verbis.

15. *I give all to my mother.* Though these words may include whatever he had to give, either chattle or inheritance; yet because it may be all personal chattles, or all real chattles, or inheritance, it was taken to be too loose and general to disinherit an heir at law, and therefore no land did pass. Per Powell J. 12 Mod. 594. cites the case of Bowman v. Milbank.

adjudged accordingly, and the rather, for that an heir at law shall not be disinherited by such doubtful and uncertain words. — Raym. 97. S. C. resolved accordingly. — S. C. cited 3 Mod. 46. Arg. says, it was adjudged that a fee simple did not pass by a particle all, because it was a relative word, and had no substantive joined with it, and therefore it might have been intended all his cattle, all his goods, or all his personal estate, for which uncertainty it was held void; yet Twidlen J. in that case said, it was adjudged, that if a man promise to give half his estate to his daughter in marriage, that the lands as well as the goods are included.

16. *The free use of Spaine's Hall devised for a year, passes the interest in it for a year; for free-use passes a right to take the profits for the time limited by the will.* 1 Saund. 186. Adjudged, and judgment affirmed in the exchequer chamber. Mich. 20 Car. 2. B. R. Cook v. Gerrard.

17. *A devise of the profits is a devise of the land; per Ld. Keeper and said he took the difference to be where the devise is of the profits of a * chattle lease and where of lands.* Chan. Cases 240. Mich. 26 Car. 2. In case of Cary v. Appleton.

devise of the profits of a term is a devise of the term itself. Mo. 635. pl. 871. Hill. 54 Eliz. C. B. Rayman v. Gold. — S. P. per Cur. Chan. Prec. 123. Mich. 1700. in case of Foster v. Foster. — Mo. 754. pl. 1040. 2 Jac. in case of Griffith v. Smith, it was admitted by Popham, that a devise of the profits is in all cases a devise of the land itself, if the will has no other circumstance. — S. P. by Doderidge J. 3 Bullst. 105. Mich. 13 Jac. — Cart. 27. Trin. 17 Car. 2. C. B. in case of Courthope v. Heyman. S. P. by Bridgeman Ch. J. accordingly. — All. 45. Hill. 23 Car. B. R. it was admitted that a devise of an authority to take the profits, implies as much as a devise of the profits which gives an interest.

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18. *Devise of a messuage will carry with it a garden and curte-lage, otherwise of a house, unless it be cum pertinentiis.* 2 Chan. Cases 27. Pasch. 32 Car. 2. in case of Thomas v. Lane.

19. *Devise of the rent and profits to A. to be paid by the executors, per 2 J. is a devise of the lands to A.* But Holt seemed strongly to incline that the executors were *trustees for A.* who was a married woman, and the will directed that the husband should have no intermeddling. 1 Salk. 228. pl. 7. Trin. 7 W. & M. in B. R. South v. Allen.

103. South v. Allen, adjudged by two justices, Holt Ch. J. e contra. — Comb. 375. S. C. adjudged against the opinion of the Ch. Justice,

20. *It is a most known and established rule of law, that an heir is never to be disinherited but by express words, or necessary implication.* Per Lord C. Cowper. Chan. Prec. 473. Pasch 1717.

(K. 2) What passes by the Word (Lands.)

And. 123.
pl. 69.
Heydon v.
Ewer.

Pasch. 41
Eliz. S. C.
adjudged
and affirmed
in error.

—Ow. 74.
75. Ewer v.
Henden. S.

1. **A.** Being seised of an house in Dale, and of three houses and certain lands in Sale, devises his house in Dale and all his lands in Sale to B. The house in Sale does not pass; because of the express mention of the house in Dale. Adjudged and affirmed in error. Expressum facit cessare tacitum. Although in grants of lands, houses pass; yet in this case it being a devise, the intention of the testator is to be pursued; if he had intended to devise the houses in Sale, he would have mentioned them, as he has mentioned the house in Dale. Jenk. 277. pl. 100.

C. adjudged that the house in Sale did not pass. — Cro. E. 476. pl. 4. Ewer v. Hayden. S. C. adjudged accordingly in B. R. — Ibid. 658. pl. 3. S. C. and judgment affirmed in the exchequer chamber. — And. and Ow. state it as in Jenk. of only an house in Dale, and lands and house in Sale, but Cro. states it that the testator was seised of house and lands in both, and devised as above. — Mo. 359. pl. 491. S. C. stated as in Cro. E. supra, but reports the judgment to be, that the houses should pass by the devise. — 2 Roll. Rep. 347. S. C. cited by Crook as adjudged, and states it that the testator was seised of lands and houses in both Dale and Sale, and devised all his houses and lands in Dale, and all his lands in Sale, and that the houses in Sale did not pass. — S. C. cited as adjudged, and affirmed in error, and stated as before in Roll. Rep. — S. C. cited as adjudged, and stated as in Roll. Rep. above; but says, that if he had devised all his lands in Dale, and had not said any thing of the house, the house had passed. Godb. 352. pl. 447.

2. A devises that B, shall be executor of all his lands; this intends only such as he may take as executor. Noy. 48. 44 Eliz. Clement v. Casley.

3. If a man hath lands in fee, and lands for years, and devises all his lands and tenements, the fee simple lands pass only, and not the lease for years. Cro. C. 293. pl. 3.

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Cited by
King C.
Gibb. 116.
in case of
Davis v. Gibbs.

4. But if a man hath a lease for years, and no fee simple lands, and devised all his lands and tenements, the lease for years passeth; for otherwise the will would be void. Cro. Car. 293. pl. 3. Hill, 8 Car. B. R. Rose v. Bartlett.

5. All my Idsworth estate will carry the whole estate which testator usually comprehended under that name, though the lands lay in two counties contiguous, Hampshire and Suffex. Fin. R. 432. Mich. 31 Car. 2. Dormer v. Dormer.

6. If a man deviseth lands that are in mortgage, the equity of redemption will pass to the devisee; and so if copyholds that are in mortgage are devised, the equity of redemption shall pass to the devisee. 2 Freem. Rep. 65. pl. 76. Trin. 1681. Anon.

7. A. mortgaged part of his copyhold customary lands of inheritance unto B. Afterwards B. surrenders them to the use of his will, and devises them to M. his wife, for life, remainder in fee to D. the defendant, and makes M. executrix; if the mortgagor redeems, a proportionable share of the redemption money shall go to D. according to the value of the estate he had in the land; and this appearing on the pleadings to be the fact, though D, who was a defendant, had no cross bill for that purpose, nor so much as insisted upon

upon it in his answer, Ld. Chancellor ordered D. his proportionable part. And the ordinary rule of the court in such case was said to be, that one third of the money should be paid to the tenant for life, and the two-thirds residue to the remainder man, Vern. 70. pl. 65. Mich. 1682. in case of Brent v. Beft, & al.

8. *Money agreed to be laid out in lands, shall in equity be esteemed as land, and may be devised as such subject in the first place to the uses in the marriage settlement; per Ld. Harcourt, who declared it to be his present opinion.* 10 Mod. 39. Mich. 10 Ann. in Canc. Shorer v. Shorer.

S. P. Decreed per Harcourt C. and affirmed per Cowper C. Chan. Prec. 400.

Feb. 1715. Linguen v. Sowray. ——— G. Equ. Rep. 91. S. C. ——— 10 Mod. 528. Arg. cites S. C.

[The case of Shorer and Shorer, and Linguen v. Sowravs, seem to be S. C.] ——— S. C. cited by the Master of the Rolls. 3 Wms's Rep. 221. as first decreed by Ld. Harcourt in 1711. and affirmed by Ld. Cowper in 1715. ——— And the reporter in a note 3 Wms's Rep. 221. says, it is observable that the husband might have devised this money, (subject to his wife's estate for life) either as real or personal estate, according as he should have signified his intention. Thus if he had in his will described it as so much money agreed to be laid out in land, this would have been sufficient to have made it pass as personal estate, and by a will not attested by three witnesses; but without such a particular interposition of the testator, manifesting his intention, it remained ad land, and consequently belonged to the devisee or representative of the real, not of the personal estate. Determined in the cases of Crofs v. Addenbroke. Hill. 1719. Fulham v. Jones. Mich. 1720, both by the Lord Parker. But more particularly in the case of Edwards v. Warwick (Countess) 2 Wms's Rep. 171.

9. *Surviving trustee to preserve contingent remainders devised as follows, viz. As to such estate as the Lord had bestowed upon him be devised part to J. S. and his heirs, and all the rest of his real estate to his wife and her heirs.* The Master of the Rolls held, that as to the trust estate, though it be such estate, yet the legal estate being in the devisor, in the eye of the law it is his estate and his property, and therefore passes by the devise of his estate, and that if he had devised *all the land whereof he was seised*, these trust lands would certainly have passed, and this without any inconvenience; for as the testator was a trustee, so shall his devisee, 2 Wms's Rep. 199. 201. Mich. 1723. Marlow v. Smith.

10. *By a devise of all his free lands, a portion of tithes was adjudged to pass.* Arg. 9 Mod. 74. Mich. 10 Geo. in Canc.

Arg. 10 Mod. 525, 526. Arg.

cites S. P. as held Sty. 261. ——— See Roll (N) pl. 4. and the notes there. ——— One has no land in A. but has tithes there, and devises all his land in A. the tithes as they are issuing out of the land, and part of the profits thereof shall pass. Wms's Rep. 386. Mich. 1735. Ashton v. Ashton.

11. *Fee farm rents, or any other right out of lands, will pass by a devise of lands.* 9 Mod. 78. Mich. 10 Geo. 1. in Canc. Arg. [205] in case of Acherley v. Vernon.

12. *A devise of lands will pass fee farm rents, or any other right out of lands; per Cur.* 9 Mod. 78. Mich. 10 Geo. in case of Acherley v. Vernon.

S. P. and by the name of Lands, Lunds, arried to be

purchased pass. MS. Tab. Feb. 4, 1725.

13. *Copyholds will pass by a devise of his real estate; as where a contract was made for the purchase of lands, some of which were copyholds, it was adjudged, that by a devise of his real estate, those copyholds*

Chan. Cases 39. Trin. 15 Car. 2. Davis v.

Beardham. copyholds would pass in equity. Arg. 9 Mod. 75. Mich. 10
S. P. agreed Geo. cites the case of Woodier v. Greenhill.
by Ld.
Chancellor and the Master of the Rolls.

This is from
Roll tit.

Estate (N).

N. B. The
taking such
particular
divisions and
letters out
of Roll, tit.

Estate, as
concern and
distinguish
the several
estates
created by
devise,

seems very
proper to be brought thence to this head of Devise, which it immediately concerns, and may
make the same the more complete.

* Cro. J. 448. pl. 28. S. C. but nothing said as to this point, it being only a part of the limitation.

(L. a) Estate in Fee.

By Devise by what Words.

[1.] If a man has three daughters, and devises certain lands *to his wife for life*, and after her death *to his three daughters, equally to be divided*; by those words no estate in fee is devised to the daughters, but only an estate for life. Mich. 15 Jac. B. R. held at bar between King and Rumbell.]

Cro. J. 448. [2. If a man devise land to his wife for life, and after her death
pl. 28. S. C. to his three daughters equally to be divided, *and if one dies before
but this the others, then the one to be heir to the other, equally to be divided*;
likewise by these words an estate in fee is devised to the daughters. Mich.
being only 15 Jac. B. R. between King and Remball. Agreed by counsel at
a part of the bar.]
the limitation, no

question was made as to this and the former part, but the judgment was given on the whole state.
—— See the full state of this case at (N. a) pl. 7.

Hob. 65. pl. [3. If A. seized of land in W. in fee devises it to B. his son for
68. S. C. in life, and then to remain to C. the son of B. except B. purchases
C. B. adjudged a fee simple. another house with so much land, and of so great value as the said
Cro. J. 599. land in W. is, for the said C. and then B. shall sell the said lands in
pl. 23. W. as his own land, and the said B. shall pay to his sisters 10 l. viz.
Greeve v. to each 20 s. per ann. In this case C. has a fee in the land in W.
Dewell. S. B. not having made any purchase of other land, for though the first
words by themselves have not given but an estate for life, yet the

* Fol. 834. word *purchase*, in the second * clause imports in common parlance
an absolute purchase in fee, though a purchase may be also for life;
C. in B. R. and the other words, if he purchases other land, &c. then he shall
Mich. 18 have power to sell this, and not before this purchase. Hobart's
Jac. resolved by all Reports 89. Adjudged 12 Ja. between Green and Armesteed.]
the justices to be a fee.

[206] [4. If a man by his will appoints his executors to purchase land
of 100 l. per ann. for his youngest son; this will be a fee. Hobart's
No doubt Reports 89.]
this will

Import a fee simple, per Hobart Ch. J. Hob. 65. in pl. 68. Trin. 12 Jac. obiter.

[5. If a man devise land to B. and that he shall pay for it 10 l. though it be not to the value of the land, yet this is a fee-simple. Co. Litt. 9. b.]

[6. If a man devise land to another *for ever*; this is an estate in fee. Tr. 11 Jac. B. R. per Cur. in case of Whiting v. Welkings. Co. Litt. 9. b.]

Br. Estates, pl. 21. cites 15 H. 7. 11. S. P. per

Fineux. — Br. Devise, pl. 33. cites 22 E. 3. 16. and Fitzh. Devise 20. — S. P. Br. Devise, pl. 7. cites 34 H. 6. 6. — It seems that by these words he shall have an estate but for his life; for in perpetuum cannot extend further but unto the devisee, and there are not more persons named, &c. And the life of a man in this manner is said as unto him in perpetuum, &c. Tamen quere. Perk. S. 557. — But if the devise be *in perpetuum during the life of J. S.* this is not a fee simple. Dyer's Read. on Stat. of Wills. 12. cap. 5. f. 30.

Bulst. 219. in S. C. Arg. cites 15 H. 7. 12. S. P. — But if one devises land to J. S. for ever habendum for life, this is an estate for life only; per Doderidge J. and he said it had been so adjudged. Lat. 43. 44. — A devise for life in perpetuum is only an estate for life; per Twissden J. 3 Keb. 53. — 19 H. 8. 9. b. pl. 4. S. P.

[7. If a man devise land to another *to give and sell*, this is a fee. 19 H. 8. 9. Co. Litt. 9. b.]

b. S. P. — Devise to A.

for life, and then to be at her disposal to any of her children, gives A. an estate for life, with power to dispose of the fee. And per Parker Ch. J. the difference is where a power is given with a particular limitation and description of the estate, and where generally, as to executors to sell or give; for he that can give or sell an estate in fee, must have an estate in fee; but in this case the power is a separate gift distinguished from the estate, and the estate given is a certain and express estate. 1 Salk. 239, 240. pl. 19. Pasch. 10 Ann. B. R. Thomlinson v. Dighton.

[8. So a devise to another *in fee-simple* is a fee. Co. Litt. 9 b.]

Br. Devise, pl. 31. cites 30 H. 8.

[9. So a devise to another *and his assigns for ever* is a fee. Co. Litt. 9. b.]

The devisee has a fee simple

without the words (for ever) Br. Devise, pl. 31. cites 30 H. 8. — Perk. S. 557. S. P. — But if such devise be without saying (for ever) the devisee has only an estate for life. Co. Litt. 9 b. — S. P. by Doderidge J. Lat. 42. cites 34 H. 6. 7. — Br. Devise, pl. 31. cites 22 E. 3. 16. and Fitzh. Devise 20.

[10. If a man devise land to another & *sanguini suo* it is a fee. Mo. 356. Co. Litt. 9. b. where Mich. 40 & 41 El. it is cited to be so adjudged between Downhall and Catesby.]

pl. 483. S. C. but S. P. does not appear.

— Gouldsb. 126. pl. 16. S. C. but S. P. does not appear. — 3 Le. 267. pl. 359. S. C. but S. P. does not appear. — 4 Le. 113. pl. 229. S. C. but S. P. does not appear.

[11. If a man *seised of an house and land devises the moiety of his house to his wife for life. Item, he deviseth the other moiety of his house to J. his second son. Item, he devised to J. his second son the said house, and all the lands which pertain to it after the death of the wife. J. shall have an estate for life only after the death of the wife and not an estate in fee. P. 7. Ja. B. Fawcet's case adjudged.]*

See Estate (M. a) pl. 3. S. C.

[12. If A. *seised in fee* of land makes his will in these words, *I bequeath to my wife my whole estate paying debts and legacies* and dies, making *his wife executrix*, his debts and legacies being 40 l. and his *personal estate* but 5 l. his wife shall have a fee * by force of the said words, *my whole estate*; for those words extend to his land according to the common parlance, and also to all his estate in the land. Tr.

*[207]

S. C. cited 6 Mod. 107. in case of the Dutchess of Bridgewater v. the

Duke of Bolton. — Tr. 1651. Adjudged per tot. Cur. upon a special verdict between Johnson and Kerman. Intratur Hill. 1649. Rot. 153.]

293. Kirman v. Johnson. S. C. adjudged. — Mod. 100. in pl. 5. Arg. cites S. C. by the name of Jerman v. Johnson. — S. C. cited Arg. as adjudged. 3 Mod. 45. — S. C. cited Arg. Skinn. 194. — S. C. cited by Powell. J. 12 Mod. 594.

S. C. cited Arg. Lutw. 263. — In this case the son was heir at law, yet the daughter took for life only. [13. If a man devises land to his son and daughter equally to be divided; this is not any estate in fee but only for life, for the equal dividing does not go to the continuance of the estate but to the several occupations; Mich. 3 Car. in Chancery. Resolved per Sir Thomas Coventry, Lord Keeper, upon certificate of Justice Jones, that the law is such, and that it had been adjudged accordingly in B. R.]

See Vern 65. Peyton v. Banks,

Jo. 389, S. C. — Cro. C. 450. S. C. — Roll. Rep. 415. pl. 11. S. C. — In all which cases it was held that [14. If a man seised in fee of any lands, and also possessed of certain leases of land, devises the leases to J. S., and after devises to his executor all the residue of his estates, mortgages, goods, &c. his debts paid and funeral expences discharged; this shall pass a fee to the executor by the word *estates being coupled with the word goods*. Hill, 10 Car. B. R. per Cur. upon a special verdict between Wilkinson and Meream.]

it only passes an estate for life (and this in Roll is seemingly only a mistake in the print; for otherwise the reason seems somewhat odd). — S. C. cited Arg. 2 Show. 395. says the roll is according to Cro. C. 449. that it passed only estate for life, which Arg. is admitted on the other side, and says the reason is because it comes in among personal things, and in the midst of them. — Mod. 100. in pl. 5. Arg. cites Cro. C. 447. 449. [S. C.] says the court held that no fee passed, and says it was a doubt whether any estate would pass in that case but what was for years, being coupled with personal things. — 2 Show. 395. Arg. cites S. C. in Cro. C. 449. and says that it is there differently reported from this of Roll, and that Crooke's report is according to the Roll, in which it was adjudged that the word estate passed only an estate for life. — See 4 Mod. 90. Arg. S. P. and S. C. cited in marg.

Cro. C. 447. pl. 18. 449. pl. 2. S. C. adjudged. But they agreed that if he had devised all his estate in such land; [15. If a man seised in fee of Black Acre and seised also in fee of other land upon a mortgage made to him by J. S. which is not forfeited, and devises Black Acre in fee to his brother, and all the residue of his goods, leases, mortgages, estates, debts, duties, demands, household stuff, linnen, bedding, bonds, specialties, and other things whatsoever whereof he was possessed, he devised to his wife. In this case the wife shall have at most but an estate for life in the lands mortgaged to him and not a fee; for this is *coupled with chattles*, and the words (whereof he was possessed) shew that he intended but to pass the money for which the land was mortgaged. H. 11 * Car. B. R. adjudged per Cur. upon a special verdict between Wilkinson and Meream.]

or had mentioned that he had such land mortgaged in fee, and had devised his mortgage, the fee had passed. — Jo. 380, pl. 11. S. C. held that she had, at best, but estate for life. — S. C. cited by Holt Ch. J. in delivering the opinion of the court, 6 Mod. 108. as held that no freehold passed, and says it was very rightly, because of the particular words there.

Cro. C. 450. pl. 2. S. C. and S. P. at the end. [16. If a man seised in fee of land devises his estate in the land, this passes a fee. Hill. 11 Car. B. R. per Cur. in the said case between Wilkinson and Meream.]

[17. If

[19. If A. *seised in fee* of a house and land *leases it to B. for ninety-nine years*, rendering rent, and after *devises it to D. by these words, I bequeath to D. my house with all the lands* * [belonging to it for the term of] *ninety-nine years* [and] *the said D. shall have all my inheritance, if the law will allow.* By this devise the reversion passes to D. in fee. Hobart's Reports 2. adjudged between Widlake and Harding.]

* Hob. 2. pl. 2. 2. C.

18. Devise to two *et hæredibus* omitting (*suis*) give a fee simple, though otherwise in a deed by reason of the uncertainty. Br. Estates, pl. 4. cites 20 H. 6. 35. that it is so said by some; for that the one shall be taken by indentment but not the other.

19. A man *devised his land to J. S.* this shall be taken but for term of his life. Br. Testament, pl. 18. cites 29 H. 8.

20. If I by my will *release to J. S. and his heirs all my lands*, this is a good devise in fee to J. S. and his heirs, per all the justices. And. 33. pl. 83. Mich. 37 H. 8. Anon.

Bend. 30. pl. 50. S. C. in totidem verbis.

—S. C. cited 2 And. 13.

21. A. *seised of Black Acre and White Acre in fee devises both to his wife for life, the remainder of Black Acre to J. S. in fee* and leaves the fee of White Acre undisposed of, and then said, *And I make my wife my executrix of my goods and land*, the inheritance did not pass; for the word (*lands*) intends such land as she may have as executrix. Noy. 48. 45 Eliz. Clements v. Caslye.

S. C. per Powell J. 12 Mod. 594. accordingly, though he said that the words include it.

according to the civil law would include it.

22. Devise to B. his younger son and his heirs, and that if he *dies without issue*, living A. his eldest son, that the land *shall remain to A. in fee.* B. has an estate in fee and not a taylor, and A. has only a possibility to have it, if B. dies without issue. Cro. J. 590. pl. 13. Mich. 18 Jac. B. R. Pells v. Brown.

See supra (K) pl. 9. and the notes there

23. When *no estate is limited*, the devisee shall have an estate according to the intent of the devisor, which *intent shall be expounded by the words in the will*; if not that it be in special cases. Perk. S. 555.

24. And therefore if *cestuy que use* of land, or, &c. *in fee or of a man seised of land or, &c. devisable in fee, devises the same land by his will unto J. S.* Now J. S. shall have the same for his life, because that the intent of the testator cannot be otherwise taken by the words of the will. Perk. 556.

25. Devise of all his *tenant-right estate* passes a fee of his *tenant-right lands.* 2 Lev. 91. Mich. 25 Car. 2. B. R. Wilson v. Robinson.

Mod. 100. pl. 5. S. C. adjournatur. —Freem.

Rep. 112. S. C. adjournatur. — 3 Keb. 245. pl. 64. the court agreed that a devise of all his *tenant-right lands* would be but for life, but of all his *tenant-right estate* carried a fee.

26. Devise was to his sister for life, and after her decease *the whole remainder of his lands to his brother if he survived her*; adjudged that these words cannot extend to the quantity of the land, but to quantity of estate in the land; for the whole land was given to the sister for life, so there could be no remainder of that; therefore it must be the remainder of the estate in the land, and by consequence

J. S. having a remainder in fee, devised all his remainder to J. N. adjudged that a fee was

devised;
cited by
Treby Ch.
J. Paſch. 9

quence a fee-simple paſſed. Lutw. 761. 764. Trin. 1 Jac. 24
Norton v. Ladd.

W. 3. as a caſe lately adjudged in C. B. Ld. Raym. Rep. 187.

* 27. A. ſeiſed of *gavelkind-lands* and having two brothers B. and C. (B. had iſſue two ſons H. and J. and J. had iſſue two daughters M. and N. and C. had iſſue R. and R. had iſſue S.) deviſed the lands to *H. the ſon of B. if he lives till twenty-one*, and then his wife to have the houſe, &c. and if *H. die before twenty-one*, then to the next ſon of B. and if *B. have no ſon*, then to *R. the ſon of C. and his heirs*, and if *R. dies before twenty-one and my wife be dead*, then to the next heir laſt named, as it ſhall fall out. H. ſon of B. died before twenty-one without iſſue, but J. his brother entered and died, leaving two daughters M. and N. The queſtion was, if J. the ſon of B. upon the death of H. his brother before twenty-one took a fee or only an eſtate for life, and it ſeemed to be agreed both by counſel and court that B. the ſon took only an eſtate for life. Curia adviſare vult. Mich. 6 W. & M. in B. R. Skin. 385. 562. Beviſton v. Huſſey.

28. If a deviſe were to *A. and his poſterity*, it would be only an eſtate tail. Per Ld. Keeper. But the Maſter of the Rolls thought that a deviſe to a man and his poſterity would create a fee. 2 Freem. Rep. 268. pl. 336. Mich. 1703. Attorney General v. Bamfield.

29. The Bell Tavern was ſettled upon *A. for life*, remainder to *B. in tail*, remainder to *A. in fee*. *A. deviſes all the houſe* called the Bell Tavern, to *B. without ſaying for what eſtate*, the fee paſſes, otherwiſe B. could take nothing. MS. Tab. 1705. Cole v. Rawlinſon.

This in
Roll, tit.
Eſtate, is
letter (O).

(M. a) [Eſtate in Fee.]

By what Words it may be created. [By Deviſe.]

Roll. Rep. 399. pl. 25. S. C. and S. P. obiter. [1.] F deviſe be to a man and his ſucceſſors, this is a fee; for by the word ſucceſſors is meant heirs; for the heir ſuccedit patri. My reports. 14 Ja. Webb v. Herring.] Per Coke Ch. J. and agreed by Crooke J. — Mo. 853. S. P. by Coke Ch. J. at the end of pl. 1164. and ſeems to be S. C. — 3 Bulſt. 194. S. C. and S. P. agreed per Cur.

Hob. 65. pl. 68. S. C. in C. B. adjudged a fee ſimple. [2. If a man deviſe land to W. his ſon, for life, and afterwards that it ſhall remain to Thomas, ſon of W. unleſs W. purchaſe for Thomas ſo much land, of ſo great value as the ſaid land; and deviſe further that the ſaid Thomas ſhall pay 10 l. by 20 s. per ann. to his ſiſters; in this caſe Thomas has fee in this land; becauſe the words (unleſs W. purchaſe ſo much land for Thomas) by which is intended a fee; and by the words (of ſo good value) is intended the price of all the land and eſtate, and not the annual value. M. 13 Jac. B. adjudged between Green and Armſted.]
— Cro. J. 599. pl. 23. Mich. 18. Jac. B. R. Greeve v. Dewell. S. C. reſolved by all the juſtices to be a fee.

x

[3. If

[3. If devise be to a man, *paying so much rent annually to the poor of such corporation perpetually, and for default of payment the corporation shall have the land perpetually*; this is a fee because the word perpetually shews his intent. My reports 14 Jac. Webb. v. Herring.]

Cro. J. 415, 416. pl. 5. S. C. and S. P. resolved. — Bridgm. 85. S. C. and

S. P. — Roll. Rep. 398, 399. pl. 25. S. C. adjudged a fee. — 3 Bullt. 195. S. C. and S. P. adjudged. — Bridgm. 85. S. C. that the words make a fee simple; and for as much as the charge is to continue for ever, it follows that the estate must continue; for without the estate, the charge cannot be.

(N. a) Estate Tail by Devise. By what Words. By Implication.

[210]

This in Roll, tit. Estate, is letter (P).

[1.] **I**F a man devise land to *A. his daughter and her heirs, and if she die without issue* that it shall remain to B. his daughter and her heirs, and if both die without issue, to another; this is an estate in tail though an express estate in fee was given. D. 16. Eliz. 330. 20. [b. 331. a. pl.] *Claches case.*]

Three justices held, that this was an estate tail in the daughters;

but Dyer held, that there was no estate tail to any of the daughters, but that each had a fee simple conditional upon a contingent subsequent. *Ibid.* 331. a. — Mo. 362. Arg. cites S. C. — Hard. 149. Arg. cites S. C. — S. C. cited Arg. Palm. 131. and 133. — S. C. cited Sid. 148. — 2 Jo. 173. Mich. 33 Car. 2. B. R. Pemberton Ch. J. cited S. C. and said, he had heard great opinions that the case was not law.

[2. If a man devise land to B. his youngest son and his heirs, and that if he die without issue, living A. his eldest son, that the land shall remain to A. in fee; this is an estate in fee in B. and not a tail, and only a possibility in A. to have the land or not upon the death of B. without issue in his life. Mich. 18 Ja. B. R. adjudged per tot. Cur. upon argument upon a special verdict between Brown and Pells.]

See devise, (K) pl. 9. and the notes there. S. C. cited by Vaughan Ch. J. Vaugh. 273. But *ibid.* 273. says,

that if the lands had been given to T. and his heirs for ever, and if he died without heirs of his body, then to W. and his heirs, T's estate had been an estate tail, but the words were (dying without issue, living W.) otherwise no future or executory devise could be. — 2 Chan. Rep. 241. in the D. of Norfolk's case. S. C. cited by Ld. Nottingham, that if a lease comes to be limited in tail, the law allows not a present remainder to be limited thereupon, yet it will allow a future estate arising upon a contingency only, and that to wear out in a short time.

[3. If a devise of land be to another, and *semini suo*, this is an estate tail. Co. Litt. 9. b.]

[4. If A. has two sons, viz. B. and C. by several venters, and seised in fee of Black-acre and White-acre, devises *Black-acre in fee to B. and White-acre to C. in fee*, under this proviso following; that if it shall so please God either of my said sons to die before such time as they shall be married, or before they shall attain to their age of 21 years, and without issue of their bodies to be begotten, then I give all the said lands which I have by * this my will given unto such of my said sons which shall so decease before marriage, or before their age of 21 years, and without issue of their bodies begotten, unto such of those my said two sons as shall the other survive, any former gift thereof notwithstanding in this my will to the contrary, and dies, and after B. takes same and has issue a daughter

The father devised his lands to his son G. and his heirs; and if he

* Fol. 336.

die before 21, and without heirs of his body, remainder

over; ad-
judged that
by the first
clause G.
had an
estate in
fee, the de-
vise being

to him and his heirs, and the subsequent words (viz.) If he die before 21, and without heirs of his body, qualify the estate, viz. that the fee simple shall not determine, unless he die before 21, and without issue, and are not words of limitation. Swink. 154. cites Hardr. 148. Hall v. Doering — [The case was not adjudged, but argued only by counsel; and Hardr. 150. the reporter, who argued for the plaintiff, says it does not appear what became of the case, or that any opinion was given by the court in it.]

[211]

Roll. Rep.
398. pl. 25.
S. C. adjor-
natur. Ibid.
436. pl. 1.
S. C. ad-
judged.—
Bridgm.

24. S. C. adjudged.—Mo. 851. pl. 1164. Anon but S. C. adjudged.—Cro. J. 415. pl. 3. S. C. adjudged.—3 Bulst. 192. S. C. adjudged. But the whole court agreed this difference where this is limited (as in the principal case) to a collateral heir, and where to a mere stranger; that in the last case it has been a fee simple in the son, and so the remainder there had been void; because one fee simple cannot be thus limited upon another; but where the remainder is limited to a collateral heir, the same is good, being only an explanation of the former — S. C. cited Cro. J. 448. pl. 28. as resolved accordingly.—S. C. cited by the counsel, and the court. Ld. Raym. Rep. 569, 570. Trin. 12 W. 3.—S. C. cited Arg. 4 Mod. 117.

[6. So if a man has two sons and devises to the younger, and that if he die without heir, to the elder in fee, this is a tail, for it is as much as if he had said, that he devised to the younger and to the heirs of his body, because otherwise the remainder shall be void, the elder being heir to him. Tr. 4 Ja. My Reports per Coke.]

Cro. J.
448. pl. 28.
S. C. ad-
judged per
tot. Cur. an
estate tail.
—See (N)
pl. 2. S. C.
and the
note
there.—

[7. If a man has issue three daughters, A. B. and C. and devises land in this manner; I give to Joan my wife all my houses and free-land for her life, and after her decease I will it to my three daughters, A. B. and C. to be equally divided, and if any of them die before the other, then the one to be the other's heir, equally to be divided, and if my three daughters die without issue, I will it to J. S. and J. N. (two strangers) by this devise the three daughters have an estate tail and not a fee, for the intent of the devisor is apparently so upon the whole will, for the clause (and if they die without issue) and the limitation of the remainder over explains what heir he intended before, when he said, that the one should be heir to the other, otherwise the remainder would be void. Mich. 15 J. B. R. Adjudged clearly per tot. Cur. upon a special verdict between Kinge and Remball.]

Cro. J. 448.
pl. 28. S. C.
& S. P.
mentioned
as a part of
the case
only, and so
nothing said

[8. If a man devise land to his three daughters equally to be divided, and if one die before the others, that then the one shall be heir to the other; by those words the daughters have not any estate tail. Mich. 5 Ja. B. R. Agreed per counsel at the bar, and per Cur. between Kinge and Remball.]

as to this.—See (N) pl. 2 S. C.

[9. If a man devise to two for their lives, the remainder to their two sons equally to be divided, and to their heirs and each to be heirs to another, and if both (naming them) die without issue, that it shall remain to the other; this is an estate tail by the limitation of the remainder over; but by the words before, without those it had been a fee simple. P. 12 Ja. B. resolved per Cur. between Johnson and Smart.]

See tit.
Remainder
(F) pl. 3.
S. C. and
the notes
there, by
which it
will appear
that this
case was de-
cided.—

[10. If a man seized in fee devises it to his wife till his eldest son comes to the age of 24. and devised 4l. to be paid out of the land to his younger son, and if the eldest son die, that the youngest shall have it, and if he dies, that then it shall be divided between his two daughters, and if they die, that then his executors shall sell it, &c. By this devise the eldest son shall have but an estate for life, and not any estate tail, for his intent does not appear that it should be a tale. P. 41 El. B. R. Adjudged between Legwood and Burrih.]

[11. If a man devises land to R. his * eldest son for ever, and after his death to the heir male of his body for ever, and for default of such heir male to E. his eldest son for ever. R. by this devise has an estate tail and not an estate for life. Tr. 11 Ja. B. R. Adjudged per Cur. between Welkins and Whiting.]

[212]
Bulst. 219.
Whiting v.
Wdkins
S. C. but
* states it to

be to R. his younger son, and it seems plainly to be mis-printed, for Roll afterwards mentions E. as the eldest son. Adjudged per tot. Cur. that by the words and meaning of the Will R. had a good estate tail.

[12. If a man devises land to his wife for life, and after to his son, and if his son dies without issue, having no son, that another shall have it, the son has an estate tail to the heirs males of his body by this devise. Tr. 7 Ja. B. per Cur. between Robinson v. Miller.]

Fol. 837.

2 Brownl.
271. Ro-
binson's

case S. C. adjudged a good estate tail. — Mo. 682. pl. 939. Milliner v. Robinson. S. C. but it is stated there that R. devised his land to his brother J. and if he died, having no son, that the land should remain to W. for life, and if he died, having no son, to remain to the right heirs of the devisor. Resolved J. had an estate tail to the issue male, but W. had it but for life, or at least to his heirs females; for (having no son) is merely contingent; per Popham. — S. C. cited Arg. Litt. Rep. 259.

S. C. cited by Hale, Ch. J. as 4 Ja. Robinson's case; thus, a devise to A. for life, and if he dies without issue, then to remain. A. took an entail. 1 Vent. 230. — Powell J. said, as this case is in Mo. 682. and Roll 837. pl. 12. it differs from the case put by Ld. Hale, viz. no express estate for life is given to A. But if it be lawful, as put by Ld. Hale, it must be so upon this supposition, that the devisee over was heir at law, viz. One devised to A. for life, and if A. died without issue, then to his (the testator's) right heir. Now this he said might be allowed to be an estate tail in A. without contradicting the resolution in the principal case; for where the devisee over was heir, there must have been a most necessary implication that A. the first devisee should have an estate tail, because the heir of the testator was excluded from taking till A. the devisee died without issue; which distinction, he said, serves also to answer BURLEY's case put by Ld. Hale in Vent. 230. Wms's Rep. 57. Hill. 1702. in case of Bampfild v. Popham.

[13. If a man devise to his eldest son for life, the remainder to the sons of his body lawfully begotten, and if they alien, that his daughters shall have the same estate, remainder to his right heirs, the eldest son has but an estate for life and no estate tail, but his son shall have it by purchase, because it is expressly limited that he shall have it only for life. Mich. 10 Ja. B. per Cur.]

Hale said
that the
words are
(to his
eldest son
for life, &
non aliter,
&c.) though

not so printed, and after his decease to the sons of his body, and that the eldest should have for life

life by reason of the words *non alter*. Vent. 137. in case of King v. Melling.—S. C. cited Arg. 2 Lev. 59. and it was observed by the counsel of the other side, that the devisor's intent appears that the father [the testator's eldest son] should have it for life only, and the estate tail in the son; because the clause of restraint from alienation is added only to the estate of the son.—S. C. cited 4 Mod. 319. Arg.—

Chan. Proc.
468. Hill.
1716. S. C.
cited by Ld.
Chancellor,
as settled
with great
judgment
and deli-
beration.

14. A. had two sons, B. and C. A. by will gave lands to B. and his heirs male for ever, [but] if [his heir should be] a female, my next heir shall pay her 12l. a year out of the rents of the land, and shall have all the rest to himself, I mean my next heir to him and his heirs male for ever. Adjudged per tot. Cur. upon great consideration, that the devise to B. was an estate tail; for though in deed it had been a fee, yet in a will, to gratify the intent of the devisor, the law will supply the words (of his body.) And that from the other words his intent is apparent that it should be so; and therefore the lands shall go to C. Ld. Raym. Rep. 185. Pasch. 9 W. 3. C. B. Baker v. Wall.

[213] (O. a) By what Words a Tail may be made by Implication. By Devise.

This in
Roll Tit.
Estate is
letter (U)

[1. **D**EVISE to A. till his heir come to 24 years of age, and then to the heir and his heirs, and when he comes to 24 he shall have third part for life, and if he dies before 24 then he shall have for life, and after the decease of A. if the heir has not any issue remainder to the daughter of devisor, remainder to the right heirs of devisor. The heir comes to 24, yet he has no tail but fee. D. 2 & 3 Ma. 124. 38. Adjudged.]

[2. If devise be to one in tail remainder to another in tail, remainder to another in forma prædicta, this last remainder has a tail also. Dubitatur. 5 H. 4. 4. Otherwise upon a grant. Dubitatur. 5 H. 4. 4.]

[3. If a man devise one messuage to his daughter A. and her heirs, and another messuage called his great messuage to T. his daughter, being of the age of 8 years and to her heirs, and if she die before the age of sixteen, A. then living, then he wills that his daughter A. shall have the great house to her and her heirs, and if A. die without issue T. living, then he wills that T. shall have and enjoy that part of A. to her and her heirs, and if both the said daughters A. and T. die having no issue then he devises all to J. S. and his heirs, in this case the daughters have estates tail and not a fee upon a contingent subsequent. D. 16. El. 330. 20. by 3 against Claches case.]

[4. If a man devise land to R. his daughter for life, and if she marry after my decease and have heir of her body, that then that heir shall have it after her death and the heirs of their bodies per eadem verba. And if she happen to die without issue, then I devise to P. my daughter &c. This is an estate tail in R. and her heirs shall not take by purchase upon a contingent. Dubitatur Hill. 37 Eliz. B. between Clark and Davie.]

a Jo. 173.
Furnberton
Ch. J. said,
that he had
heard great
opinions
that this
case was
not law.

Mo. 593.
pl. 803.
S. C. ad-
judged,
that she
had only
an estate
for life
and the
inheri-
tance in her

heir by purchase resting in abeyance all her life and settling in the instant of her death.

death.—Ow. 148. LILLY v. TAYLOR seems to be S. C. but no judgment, the court being divided.—Vent. 226. S. C. cited by Rainsford.—S. C. cited 2 Lev. 260.—Gibb. 24. S. C. cited by Raymond Ch. J. in delivering the opinion of the court; Pasch. 1 Geo. 2. B. R. says the name of the case is really CHERR v. DAY, and is entered on the Roll, Hill. 35 Eliz. Rot. 467, and the case was that Joan Marsh devised lands to Rose her daughter for life; and if she have heir of her body, then I will that the heir after my daughter's death shall have the land and to the heirs of their body begotten; and for default of such issue remainder over, it was said in Croke, that at first it was agreed by all the justices, that a devise to one and the heir of his body is an estate tail and shall go to all the heirs of the body; heir is nomen collectivum, so says 1 Ro. Ab. 833. (K) according to Popham Ch. J. and Fenner fed adjournatur. Moor, who is a very good reporter says, it was adjudged she had but an estate for life, and the inheritance in her heir by purchase, resting in abeyance all her life, and vesting in the instant of her death. When Croke reported this case he was a young man, and Rolls had not then begun to study the law and had this case only by hearsay; judgment is not entered on the roll, but Moor says, it was adjudged, which is agreeable to my Lord Hale's manner of citing it, who says, and so is the case of CLARK v. DAY; but this not truly stated in any of the books; Moor comes the nearest to it, as it is upon the roll; the true state of the case was, M. seised in fee, devised lands to her daughter R. for life, and if she marry after my death, and have any heirs lawfully begotten, I will that her heir shall have the lands after my daughter's death, and the heirs of such heir. So that upon the whole issue is not properly a word of limitation, but may be taken either one way or the other; in a conveyance, it is a word of purchase and not of limitation; but in a will it is governed and directed by the intent of the party, here it is designatio personarum.—S. C. cited by Powell J. who took notice that Roll says here, that Rose had an estate tail, but by Moor, (with whom Lord Hale agreed in case of King v. Melling) she had only an estate for life, though in arguing * of that case the roll being brought into court it appeared, that no judgment was ever entered, Wms's Rep. 57, 58.—And there is a note says that by the report in Croke it appears that Gawdy and Fenner J. held, that Rose had but an estate for life, though Popham Ch. J. held that she had estate tail.

* [214]

[[5] 6. If a man devise that his land shall descend to his son and heir, and that his executors shall take the profits of them till his son dies without issue; proviso, that if his son dies without issue, that then all the land shall remain to the right heirs and posterity of the deviser and his name perpetually. This is an estate tail in J. clearly. M. 12 Ja. B. per Cur. between Cumbden and Clerk.]

not saying executors shall take the profits till his son should come to twenty-four years of age and then they to make account and satisfy him, proviso that, if &c. Hobart Ch. J. held that the lands shall come to J. in tail by the devise and the reversion by descent. Ibid. 31.—Mn. 860. 861. pl. 1181. S. C. the court adjudged the devise to the right heirs of his name and posterity to be void, and consequently, that the reversion descended in fee to J. the son.—Brownl. 129. Corander v. Clerk. S. C. but not exactly S. P.

Hob. 29. pl. 13. S. C. but there it is certain friends of his [the testator's]

(P. a) Estate for Life by Devise.

In whom an Estate for Life shall be said to be raised by Implication.

This in Roll. tit. Estate is Letter (L. a)

[1.] If a man devise land to his daughter in tail with diverse remainders over provided if his daughter and every one in remainder permit and suffer T. who now occupies the land to enjoy it during his life, this shall not give any estate for life to T. because he devises that he should be only permitted to enjoy it upon a penalty. Mich. 37 El. B. Thomas's case, per Cur. Although the proviso be also idle the daughter being heir at common law and so is to have advantage of it, if it be a condition.]

R 2

[2, If

Br. Devise
pl. 52. cites
S. C. &
S. P.
tempore
H. 8. but
cites 13 H.
7. 17. as

to the devise of his goods after the death of his wife that his son shall have them.—Cro J. 75. cites S. C. and agreed to by all that the devise of the land to the wife is good by implication. But if such devise had been to a stranger after the death of his wife, it might peradventure have been otherwise; because the heir in the interim might have had it—S. C. cited by Anderson Mo. 123. pl. 269. Pasch. 25 Eliz.

Fol. 844.

* In the original it is (devise) but in Cro. J. 74. pl. 4. Horton v. Horton. S. C. it is (alien) and Popham, Gawdy, and Yelverton held, that it was not any breach of the condition, for it is not any devise to the feme by implication, because it would in such case make a forfeiture of the estate; and the devise to the son after the feme's death is only a demonstration when his estate shall commence, and in the interim the executors may well have it.

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Cro. J. 74. 75. pl. 4. Horton v. Horton. S. C. & S. P. held by three justices.

[2. If a man devise land, whereof he is seised in fee, to his son and heir after the death of A. the wife of the devisor, this shall raise an estate to A. for life, because the devisor has shewn his intention that his heir shall not have it during the life of his wife; whereas if it had not been for the devise he would have had it immediately upon his death. 13 H. 7. 17. b.]

[3. If lessee for years upon condition not to *alien it to any but to his son or daughters, devises that his son shall have it after the death of the wife of the devisor; this does not give any estate to the wife by implication, because the son to whom this is devised is not to have it by the law without the devise, and therefore the life of the wife is only a limitation of the time when the son shall have it from the executor, who is to have it in the mean time. Tr. 3 Ja. B. R. between Burton and Horton, per 3. against 2. Nota that in this case † also, if it should be a devise to the feme by implication it would be a forfeiture by implication.]

[4. If a man devise a term to his son after the death of the wife of the devisor; this shall not raise any estate to the wife, because it does not appear that his intent was so, inasmuch as the son ought not to have it by the law by the death of the devisor without any devise, but the executor. Tr. 3 Ja. B. R. held by three in the said Burton's case.]

[5. If a man devise land to J. S. and his heirs after the death of J. D. or after twenty years and dies during the life of J. D. or during the twenty years, the land shall descend to the heir of the devisor. For during this time the devisor has made no disposition of the estate, but this is left to the law. P. 40 El. B. R. Adjudged between Reding and Stone.]

This in Roll. tit. Estate is letter (M. a)

(Q. a) Estate for Life or otherwise.

By Devise. [By the Words Also, Item, &c.]

[1. If a man devise in this manner, I devise Black-acre to my daughter F. and the heirs of her body begotten, item, I devise unto my said daughter White-acre; the daughter shall have but an estate for life in White-acre, for the word (Item) is not so much as (in the same manner) Tr. 40 El. B. R. per cur.]

[2. If a man devise Black-acre to one in tail, and also White-acre, the devisee shall have an estate tail in White-acre also, for this is all

all one sentence, and so the words which make the limitation of the estate go to both. Tr. 14 El. B. R. per Fenner cited to be adjudged in Bank.]

[3. If a man *seised in fee of a house and land* and makes his will in this manner, *I devise the moiety of my house to my wife for life, item, I devise the other moiety of my house to J. my second son; item, I devise to J. my second son all the said house and all the land that appertains to it after the death of my wife.* In this case, by this will, J. shall have an estate for life only after the death of the wife and not an estate in fee. P. 7 Ja. B. adjudged in Fawcet's case.]

4. In the first clause there had been no person named, but the words had been, *item, I give the manor of D. item, I give the manor of S. to J. K. and his heirs*, this shall be referred to both the manors. Per Dyer Ch. J. Mo. 53. pl. 153. Pasch. 5 Eliz.

A man made his will in this manner; *item, I give*

my manor of D. to my second son. *Item, I give my manor of S. to my said son and to his heirs.* It was resolved by the justices, that in the first he had but an estate for life, and the item seems to be a new gift to a greater preferment in the second place for the amendment of the other Mo. 53. pl. 153. Pasch. 5 Eliz. Anon.

5. *I give my lands in A. to my son T. in tail, also, I bequeath to my said son T. all my lands in B. and also all my lands in C. also I *give to the said T. my island called Owsey, to have and to hold all the last demised premises to the said T. in tail*, this is an entail of all the lands in B. and C. Le. 57. pl. 73. Pasch. 29 Eliz. C. B. Wiseman v. Wiseman.

And. 160. S. C. Adjudged. S. C. adjudged. — Ow. 140. * [216]

6. A. devised *Black-acre to B. in fee, and White-acre to B. in tail*, and afterwards said, *I will, that if B. dies without issue within age, Black-acre shall go to J. S. item, I will, that White-acre shall go to W. R. and doth not say in the second item (if B. dies without issue within age) it was adjudged that the second item shall be without condition.* Godb. 146. pl. 185. 3 Jac. B. R. Pinder's case.

7. *I devise to my eldest son and his heirs Black-acre for his part; item, I devise to my second son White-acre for his part; it is a fee in second son, because it has reference to the part of the eldest; per Coke, Haughton and Croke J. Roll. R. 369. pl. 23. Pasch. 14 Jac. B. R.*

3 Bulst. 127. S. C. cited, but with the difference of (and) instead of

(item). But per Croke J. the fee to the second son is by reason of the words (*for his part*) and otherwise the omitting the words (*to him and his heirs*) would be in law as a direct negative, that he should not have it in the same manner as the eldest had Black-acre.

8. I devise *Black-acre to J. S. item, I devise White-acre to J. S. and his heirs*; per Coke Ch. J. it is only estate for life in Black-acre; the item has no dependance upon the first clause, but is distinct and several. Roll Rep. 369. pl. 23. Pasch. 16 Jac.

9. Devise of land to his wife for life, *she paying out of the rents, &c. yearly to S. during his life, and if my wife die during the life of S. I likewise then devise all my said lands to S. he paying yearly 3l. out of the said lands to T. during his life*, and likewise 20s. to L. during his life. Adjudged that S. had fee; for L. may out-live the estate for life to S. and so there would be no estate to pay it out of. 2 Roll. R. 80. Pasch. 17 Jac. B. R. Spicer v. Spicer.

S. C. cited by Vaughan Ch. J. Vaugh. 262. and says it was a very measuring case, and that all the four judges agreed to at the words of a will which

shall disinherite an heir at common law, must have a clear and apparent intent, and not be ambiguous, or any ways doubtful. — 8 Mod. 222. Arg. S. P.

10. A. seized in fee, had three sons, B. C. and D. and devised land to B. in tail, remainder to C. in fee, and other lands to C. in tail, remainder to D. in tail, and then *other lands to D. in fee.* Item, *I give Black-acre to my said son D.* Item, *I give to my said son D. White-acre; also I will that all bargains, grants, &c. which I have from J. S. my son D. shall enjoy, and his heirs, for ever, and for lack of heirs of his body, to my son C. for ever.* Agreed by all, that the bargains and grants, &c. only were intailed, and that D. had but estate for life in Black-acre, Green-acre, and White-acre. Cro. C. 368. pl. 5. Trin. 10 Car. B. R. Spirt v. Bence.

11. Devise of White-acre to J. S. and *his heirs; (and) or (item), Black-acre*, in both those cases J. S. has fee simple in Black-acre as well as in White-acre. But if it was, *I devise White-acre to J. S. and his heirs (and) item I give Black-acre (or) item I give Black-acre.* In these last cases J. S. has but estate for life in Black-acre; per Windham J. Sid. 105. at the end of pl. 13. Hill. 14 and 15 Car. 2. B. R.

12. A. had two sons B. and C. A. devised thus, *I give to C. my pastures in the South-fields; and also I will that all bargains, grants and covenants which I have from N. Webb, C. shall enjoy, and his heirs, for ever; and for want of heirs of his body, to remain to B. for ever; per tot.* Cur. agreed the words of the will to disinherite an heir at law must be clear and not ambiguous, and therefore that C. had only estate for life in South-fields, and an estate tail in the rest. Vaugh. 262. Hill. 20 and 21 Car. 2. C. B. in case of Gardner v. Sheldon.

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13. If a man devises *Black-acre to A. and the heirs of his body*, and also devises *White-acre to the same person*, he hath but an estate for life in White-acre; otherwise had it been (in the same manner) it had given an estate tail; for the word (also) is not so strong as the words (in the same manner.) Arg. Mod. 100. pl. 5. Mich. 25 Car. 2. B. R.

14. Devise to A. *for life, and to his heirs, and for want of heirs of him, to B. in the same manner, and for want of heirs of him, to C. and his heirs for ever*, A. and B. had but estate tail, remainder in fee to C. 3 Lev. 70. Trin. 34 Car. 2. C. B. Parker v. Thacker.

15. A. seized in fee had issue two sons, and devised all his land to his eldest son, *and if he dies without heirs male*, then to his other son *in like manner* gives an estate in tail. The question was, whether this was an estate tail in the eldest son? Curia, 'Tis plain the word body, which properly creates an estate tail, is left out; but the intent of the testator may be collected out of his will that he designed an estate tail; for without this devise, it would have gone to his second son, if the first had died without issue. 'Tis therefore an estate tail. 3 Mod. 123. Hill. 2 and 3 Jac. 2. B. R. Blaxton v. Stone.

16. A. having a remainder in fee *exp. tant upon an estate tail in the Bell Tavern*, and possessed of several leasehold estates, devises all his estate, right, title and interest, and all the term and terms of years

in

in whatever he held of J. S. and also the house called the Bell Tavern to J. B. By this devise B. hath a fee in the Bell Tavern, because it is but one sentence coupled by the word (*and also*) and governed by one verb, by which the preposition (*in*) subintelligitur, and put into Latin, and it is *ac etiam domo vocat'* &c. and is carried to the Bell Tavern, and this must be taken to be the intention of the testator, who could not intend so vain and useless an estate as for life only after an estate tail. Adjudged by Powell, Powys and Gould, contra Holt Ch. J. 1 Salk. 234. Hill. 1 Ann. Cole v. Rawlinson.

17. J. S. made his will thus, viz. *I devise an annuity to H. in fee, item, I give my manor of B. to A. and his heirs; item, I devise all my lands, tenements and hereditaments to the said A. item, I devise all my goods and chattles, and whatever else I have not before disposed of, to the said A. he paying my debts and legacies, and makes A. executor.* Held, that item in a will is usually to introduce new distinct matters. 2dly, That hereditaments is not taken to denote the measure or quantity of the estate, because it has another meaning. But 3dly, that by the words whatever else he had not before disposed of, a fee passed, for this could not have any effect upon the personal estate, because that was fully given away before, and therefore it must extend to remainders, &c. and this enforced by the latter words (*paying, &c.*) and the annuity in fee. 1 Salk. 239. pl. 18. Hill. 8 Ann. C. B. Hopewell v. Acland.

18. *I devise all my lands in B. to my eldest son; item, I give to my second son C. all my lands in D. also to my daughter A. R. I give 500l. to be paid as soon as may be out of the aforesaid estate and premises, and within three years, if it be possible.* Per Master of the Rolls the second son has but an estate for life, chargeable with the proportion of the 500l. and granted a perpetual injunction against waste in the younger brother. Hill. 1713. Redoubt v. Redoubt.

(R. a) What Words give Estate for Life, Estate in [218] Tail, or in Fee.

If he die without Issue &c. And how construed.

1. **T**HE testator having two sons and a daughter, devised his lands to his wife for 10 years, remainder to his youngest son and his heirs for ever, and if either of his sons died without issue of his body, then to his daughter and her heirs in fee; the youngest son died without issue in the life-time of his father; the question was, whether the eldest son should have the land as tenant in tail, or fee simple by intendment of deviser, or whether the daughter should have it? And all the justices of C. B. held that this was a good remainder to the daughter, notwithstanding devisee's death in the life of the testator. Dy. 122. a. pl. 20. Mich. 2 and 3 P. & M. Rickman v. Gardner.

Swinb. 158. cites S. C. as adjudged that the eldest had an estate tail. [But I do not observe the point resolved there.]

Le. 285. S. C. Leigh's case. — S. C. cited Lev. 36. in case of Goodin v. Clerk.

So note a difference between dying without issue, and dying without children; per Hale Ch.

Mo. 422. pl. 590. Sewell v. Garret. S. C. adjudged that the issue of R. shall have the land, and not those in remainder; and the word (Or)

was construed (And.) — Noy. 64. Garrard v. Soule. S. C. adjudged an estate tail in R. — 2 Verp. 377. cites S. P. as adjudged on a special verdict, that the issue of R. should not take but the remainder-man, and cites it as the case of Jennings v. Hellier. — 12 Mod. 276, 277. Hill. 11 W. 3. in case of Hilliard v. Jennings, it was said by Holt Ch. J. on citing Cro. E. 525. that there is no necessity to construe (Or) as (And.) For it might be the design of the father to hinder him from marrying till his age of 21, and he denied that case to be law.

Mo. 361. pl. 494. Bullen's case. S. C. argued; but not adjudged.

2. A. devised his lands to B. his son, in tail, and if he depart without issue, that then his sons in law shall sell his land. B. dies, leaving a daughter, and after the daughter dies without issue. Adjudged they may sell the land. Cro. E. 26. pl. 5. Pasch. 26 Eliz. C. B. Lee v. Vincent

3. A. had issue B. C. D. and E. and devised to his wife for life, and after her death to C. his son in tail, and if he dies without issue, then to his children; B. had issue a son, and died; and C. died without issue. Resolved, the son of B. shall not take as one of the children of the testator. Vent. 229. cited as Tyler's case. Mich. 34 Eliz. B. R.

J. Arg. Vent. 230. Mich. 24 Car. 2. B. R. in the case of King v. Melling.

4. A. seised of lands in fee, and having four sons devised them to R. his eldest son, and his heirs for ever, and if R. died within the age of 21, or without issue, the lands to be equally divided amongst the other sons and died. R. had issue a daughter and died within age; the court held, that the remainder to begin at the dying within age was not good, so as the first part of the will was void, and then by the second part R. the devisee had an estate in tail which shall descend to the daughter, and in this case the remainder was not to commence until the devisee died without issue. Cro. E. 525. pl. 55. Mich. 38 & 39 Eliz. B. R. Soule v. Gerrard.

5. A. devised land to his wife for life, and that after her decease B. his eldest son should have the land 10 l. under the price it cost, and if B. die without issue, then C. should have the land 10 l. under the price it cost, and if C. die without issue, then D. should have it, paying the value thereof to the executors of the wife, and also by the same will A. desired his feoffees at the request of his wife to make estates accordingly, it was argued that this was a condition subsequent but adjournatur. Goldsb. 134. pl. 33. Hill. 43 Eliz. Bullen v. Bullen.

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6. A devise to A. for life, remainder to the next heir male; and for default of such heir male, then to remain. Adjudged an estate tail. Vent. 230. cites 43 Eliz. Burley's case.

7. Devise to his wife for life, remainder to his son in tail; and if he die without issue, then the lands to remain to R. W. and his wife for their lives, and after their deceases to the children. Popham and Glwydy were of opinion, that they had an estate tail; but Fenner and Clench held, that they had only an estate for life. Gouldsb. 139. pl. 47. Hill. 44 Eliz. Anon.

8. A man devised land to his four sons in fee, and if one of them died without issue, that his part should survive. In that case it was held, that if three of them died without issue, the fourth had a fee simple,

simple, because the subsequent words were not added by way of limitation, but of determination. Arg. Hard. 150. cites Mich. 2 Jac. C. B. Emerson's case.

9. A man hath issue A. and B. and devises lands to A. and if he die without heirs, that B. his brother shall have it: it was said by the court, that this shall create an estate-tail in A. because it appears in the will that the testator must intend an estate-tail; for that it is impossible for him to die without heirs whilst B. his brother was alive; and so they said it had been often ruled. Freem. Rep. 74. Trin. 1673. in C. B. Allen v. Spendlove.

10. A. devised lands to J. S. in fee in trust for B. and the heirs of her body, and if B. die without issue to C. for life, and in another clause in the will he devised that if B. die without issue, and C. be then deceased, then, and not otherwise, he gave the land to J. N. and his heirs, B. died without issue, and C. survived her and died. Upon a bill by J. N. against J. S. and the heir at law of the testator to have this trust executed; Ld. North decreed it for J. N. though C. survived B. because the word (if C. be then deceased) seemed to be put in to express his meaning, that C. should be sure to have it for her life, and that J. N. should not have it till she were dead, and also to shew when J. N. should have it in possession. 2 Vent. 363. Hill. 35 & 36 Car. 2. Anon.

11. Upon a special verdict this case was, P. was seised of two messuages in fee after the death of his brother, and had issue two sons, R. his eldest son, and N. his youngest son, and four daughters, E. M. O. and A. and made his will in writing, and devises his two messuages to N. his younger son, and he to have 30 l. per ann. for his maintenance for ten years after the death of his grand-father, and the residue of the profits to be applied for raising portions for his daughters; and if N. die, then he gives the estate that N. had to his four daughters, share and share alike; and then further says, and if it shall please God all my sons and daughters die without issue, then he devises it to his sister and her heirs, &c. The devisor dies, the grand-father dies, N. enters and dies without issue; the four daughters enter and are seised. Adjudged per tot. Cur. that here is no estate tail in the daughters. Skinn. 266. Hill. 2 & 3 Jac. 2. B. R. Price v. Warren.

12. A. had two sons B. and C. A. devised lands to C. and his heirs, provided that if C. died without issue, living B. that then B. should have the land, and resolved that this was good to B. by way of executory devise, cites Pell v. Brown so adjudged, for C. had no estate tail, but a limited fee. 4 Mod. 283. Patch. 6 W. & M. in B. R. in case of Reeve v. Long:

not being allowed it must be a void limitation to B. unless construed to be an executory devise to him, and that was the reason of that judgment, on purpose that the intent of the testator might be fulfilled. 4 Mod. 283. in case of Reeve v. Long.

As to the case of Pell v. Brown, the great labour was to make it an estate tail in C. which

13. There was a proviso in a marriage settlement, that if the wife survive the baron, they * not having issue between them lawfully begotten, then the wife (whose estate it was) might revoke and limit new uses. The husband died, and left a son, who died living the mother; per Ld. Cowper, those words are not to be confined to the

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Ch. Prec.
294. S. C.
— * Not
having issue
or without
the

issue of their two bodies lawfully begotten, &c.

Per *Ld. Cowper* her power arose whenever the issue failed. *Ch. Proc.* 293. *S. C.*

the moment of the husband's death, but takes all the whole time of the wife's surviving. 2 *Vern.* 651. *Pasch.* 1710. *Holt v. Burleigh.*

14. Where an estate is made to A. and the heirs of his body, and if he die without issue, or without heirs of his body, remainder over, this is a good limitation whenever the issue fails; though in that case if he leaves issue, he cannot properly be said to die without issue. Per *Ld. Cowper* *Ch. Proc.* 294. *Pasch.* in case of *Holt v. Burleigh.*

Wms's Rep. 198. *Pasch.* 1712. *S. C.* but adds that the devise was also, viz. And in default of payment as aforesaid, then the testator devised the lands to the legatees for payment.

15. A. devised lands to M. his wife, remainder to his son and his heirs, provided if the son died without issue of his body, then 200*l.* to his daughter's [nieces] to be paid within six months after the death of the said wife and son. The son left issue which died presently after [within the six months] without issue; per *Harcourt K.* Though in some cases a man is said to die without issue whenever there is a failure of issue as to limitation over of lands of inheritance; yet in this case the 200*l.* as a personal legacy, was not intended to arise on any remoter contingency, than of the son's dying without issue living at his death. 2 *Vern.* 686. *Trin.* 1712. *Nicholas v. Hooper.*

But as to this it was held, that with respect to the legatees, if the legacies take any effect, the words of the will pass a legal interest, and the court does not hinder the plaintiffs from proceeding at law in an ejectment, but dismisses the bill; *And. ibid.* page 200. The reporter distinguished this case from the case of *Gooding v. Clerk*, which was an estate in fee of which no recovery could be suffered, and so there was danger of a perpetuity, whereas this was of an estate tail, so that a recovery suffered by the tenant in tail would have barred the 200*l.* portions expectant thereupon.

16. Devise of land to A. in tail, and after A's death without issue to B. A. dies in testator's life, leaving issue. The devise to A. is void, and B. shall take the remainder presently, per *Cowper C.* though he said it was against the words and intention of the will, and also against a maxim, that a heir is not to be disinherited without express words. 2 *Vern.* 723. *Mich.* 1716. *Hutton v. Simpson.*

Trin. 1719. adjudged the legacy good, and decreed with interest and costs. 2 *Vern.* 766. *S. C.*

17. A. devised his personal estate to M. provided if she dies without issue by A. then 80*l.* shall remain to B. and makes M. executrix, and B. dies, living M. and then M. dies without issue. *Cowper C.* took time to look into the will, but seemed to be of opinion for the devise, and took a difference between a devise to one and the heirs of his body, and if he dies without issue, then to remain over, and the devise in the present case which was only to M. generally, and if she dies without issue, &c. That in the first a limitation of a chattle over would be void. But in this case it was not a devise over, but a contingent or condition precedent, which being fulfilled by the death of M. without issue, the devise over may take place as a new original devise, and not as a remainder. For by the devise to M. the wife generally, the whole interest was not absorbed or taken up, as it was in the case of a devise to her and her issue, and therefore upon the happening of the contingency it might take place. But this was thought by several to be all one, and would

would introduce a perpetuity, since not confined to the death of the wife, or any time certain, and who must have it in the mean time. But my Lord would consider of it. Ch. Prec. 483. Hill. 1717. Pinbury v. Elkin.

* 18. The words dying without issue, have a *two-fold meaning*, viz. without issue at the time of his death, or without issue *whenver the issue fails*. And in *† cases of inheritance* if lands are devised to one, and in case he shall die without issue, &c. this gives an estate tail by implication, which shall go to his issue, and they shall take in course of descent to all succeeding generations; but to make such a construction *is case of a term*, which cannot come to the issue by descent is unnecessary, and therefore in such case, the other construction of the words which is most natural and obvious, shall take place, and it shall be intended in case of a devise of a term with such words (if he dies without issue living at his death) and so being confined within the compass of a life hinders not the limitation over, but it may well take place by executory devise. G. Equ. R. Pasch. 4 Geo 1. Target v. Grant,

Abr. Equ. Cases 193. S. C.

These words have two senses, viz. a *legal* and a *vulgar*. The legal one is, wherein a man is said to die without issue whenever his issue fails, though some ages after the

death of the party, and the words shall be understood in the *legal sense*, for the support of the intention of the party. But never for the destruction of it. Per Parker C. 10 Mod. 403. Target v. Grant.

S. C. & 8 P. † And those words (if *A. die without issue*) in case of an inheritance, are inserted *in favour of the issue*, and to let in the issue after the death of the father; but in case of a term, those words cannot have the same effect; for the father takes the whole, which on his death will not go to his issue but to his executors. Per Ld. C. Parker. Wms's Rep. 432. pl. 121. Pasch. 1718. S. C.

19. A devise to *E. H. and her heirs, and if she and D. S. die without issue*, he gives several annuities charged upon the premises to charitable uses; resolved that *E. H.* had an estate in fee. Comyns's Rep. 542. pl. 224. Pasch. 9 Geo. C. B. Scrape v. Rhodes & al'.

20. A devise, that if *W. the eldest son of the testator should happen to die without issue*, that then, and not otherwise, after *W.*'s death, he devised it over to his son *R.* and his heirs; held that *W.* took an estate tail by implication. Comyns's Rep. 372. pl. 186. Trin. 9 Geo. C. B. Walter v. Drew & al'.

21. Sir Geo. Strode by his will, dated May 21, 1707, devises his estate in Suffex, &c. to his son Lytton Strode in tail, remainder to his grandson Strode Bedingfield for life, remainder to his first, second, &c. sons in tail male, provided always and upon condition, that he the said Strode Bedingfield and his issue male should take the name and arms of the Strodes; and in case he or they should refuse or neglect to change or alter their surname from Bedingfield to Strode, that then that devise to be void; and then in such case, he devises the same to his godson George Darnelly for life, remainder to his first, second, &c. sons in tail male, upon condition that the said Darnelly and his issue male should take the name and bear the arms of the Strodes; and in case he or they shall not alter their surnames from Darnelly to Strode, then that devise to be void, and in such case devises the same to his right heirs for ever. Note, the said Lytton, who was the only son and heir to the said testator Sir Geo. Strode, survived the testator, but died the latter end of April 1710. without issue, and without

without suffering a common recovery, and Strode Bedingsfield upon his death entered upon the estates, and changed his name to Strode, and in every respect complied with the above-mentioned proviso during his life, and continued in possession till his death, which happened in May 1725, without issue. The question arising is, whether the said George Darnelly can take any estate after the death of the said George Strode, by virtue of the will of the said Sir George Strode, the said Strode Bedingsfield having during his life taken upon him the surname of Strode, and in every other respect complied with the will of the said Sir George Strode. This case was sent by the Ld. Chancellor to the Judges of B. R. for their opinion which was as follows, viz. "We are of opinion, that George Strode, alias "Darnelly, cannot take any estate after the death of Strode Strode "by virtue of the will of Sir George Strode above-mentioned, "the said Strode Bedingsfield therein named having during his "life taken upon him the surname of Strode, and in every "other respect complied with the will of the said Sir George "Strode.

R. Raymond.
F. Page.
Ja. Reynolds.
E. Probyn.

The decree in this cause was affirmed in the House of Lords. MS. Rep. Amhurst v. Darnelly.

Ibid. 57. observed that in this case there was no precedent limitation in tail.

22. A devise was to trustees *for his wife so long as she should remain unmarried, then in trust for such child and children as he should leave at his death, equally to be divided between them, and if either of them die without issue, then his share to go to the survivor, and if both die without issue, then in trust for the defendant.* He left two daughters, who both died without issue, under age; and there the words, dying without issue, was held to be issue living at the death, and so the limitation to the defendant allowed to be good. Cases in Equ. in Ld. Talbot's time 56. cited by the Solicitor General in the case of Sabbarton v. Sabbarton, as heard the 2d of May 1734. Atkinson v. Hutchinson.

Ibid. 57. S. C. cited by Ld. Chancellor, who said the contingency of B's having issue was to arise within the compass of

23. A devised to B. *for life, then to such person as he should marry for her jointure, and after her death, to the heirs of the body of B. and the executors, administrators, and assigns of such heirs during the residue of the term; and for default of such issue of B. then to C.* This limitation to C. was held good, the words being taken to be *heirs living at his death.* Cases in Equ. in Ld. Talbot's time 56. cited by the Solicitor General in the case of Sabbarton v. Sabbarton, as heard the 2d of May 1734. Donne v. Merrefield.

a life, and that there were no words carrying a general failure of issue by reason of the words (executors, administrators, and assigns) which restrained the word (heirs) to immediate heirs, and that contingency never happening, the limitation over was allowed to be good.

(S. a) What Words give what Estate.

Paying, &c.

1. A. Seised of a remainder in fee after the death of his father tenant for life, devises thus; I devise to D. my wife *the land that I have or may have in reversion after the death of my father*, yielding and paying therefore yearly during the life of my father 40s. This passes only estate for life, and no rent payable till after the remainder falls by death of the father who has no heir during his life. D. 371. b. pl. 5. Mich. 22 & 23 Eliz. Anon.

2. If A. devises lands to D. *his younger son, paying such a sum unto W. R. and J. S.* the devisee has a fee simple, and the quantity of the monies, be it great or small, is not material. 2 Le. 114. pl. 152. Trin. 31 Eliz. B. R. Wellock v. Hammond. Cro. E. 204. pl. 39. Trin. 32 Eliz. B. R. the S. C. and per Cur. held

accordingly. — Bridgm. 138. cites S. C. and S. P. agreed, and says, the reason is plain; for it is not limited to be paid out of the land or profits, but it is a payment in gross, and it may happen that the devisee may die before he can receive so much of the profits. — 3 Rep. 20. b. 21. a. cites S. C. & S. P. resolved, and cites Br. Estates, pl. 78. 4 E. 6. and Br. Testaments, pl. 18. 29 H. 8. and that D. 371. b. 22 Eliz. no mention is made of the value of the land any more than in case of bargain and sale of land in 4 E. 6. Estates 78 and yet the fee simple of the use will pass. — S. C. of Wellock v. Hammond cited per Cur. Cro. C. 158. — Cart: 225. Mich. 23 Car. 2. C. B. in Thacker's case, the same diversity is taken Arg. where the money to be paid is a sum in gross; whether it is entire on the land or not, or whether it is to be paid in present or in futuro; and if so, this shall advance the estate in fee; but an annual rent or sum to be paid out of the profits, this makes no larger estate than the words will bear. Per Ellis J. in some cases paying shall not make a fee; but if it be apparent that there will be a loss or peril, a fee passes.

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3. A. devised lands to C. *a younger son, and willed that C. should pay annually to B. (his eldest son) and his heirs 3l.* Resolved that this was an estate in fee in C. Cro. E. 744. pl. 22. Hill. 42 Eliz. B. R. Shailard v. Baker.

4. A man having issue a daughter, devises *part of his land to his daughter, and the other part to his wife for her life, with the profits whereof she was to educate his daughter, and that after her death this shall remain to his brother, paying to one 20s. and other small sums, amounting to 40s.* the land was of the value of 31. per annum; adjudged his brother had a fee simple. 6 Rep. 16. a. Hill. 37 Eliz. C. B. Collier's case.

N. B. If the devisee to the brother had been with an intent that he should educate the testator's

daughter with the profits, or that out of the profits he should pay so much money to others, this had been but an estate for life; for he is to pay this out of the profits and so he is sure to come by no loss; but in the case before he may die before satisfaction, and therefore it is a fee simple; for the law will intend that the devise was for his benefit, and not for his prejudice. Ibid. — Cro. E. 378. pl. 29. Walker v. Collier. S. C. resolved the brother should have fee, especially the money not being appointed to be paid annually; and that the jury's not finding the value is not material. — S. C. cited Bridgm. 138. — S. C. and same difference cited Arg. 2 Mod. 25. — S. P. Hob. 65. pl. 68. Trin. 12 Jac. in case of Green v. Armistead. — Cro. C. 158. 159. Pasch. 5 Car. B. R. the court observed the difference between a sum in gross to be paid and an annual sum.

Cro. E. 497. pl. 18. S. C. Gawdy held that D. should have an estate tail, but the other 3 contra. — S. C. cited 2 Show. 39. that the payment was intended for the same estate as was devised.

5. A. seised in fee, has three sons, B. C. and D. and devised to B. and C. and D. severally, certain parcels of land, without mentioning of any estate which they should have, and this was in reversion after the death of the wife, and paying 10l. a-piece to the daughters, and that *if any of the sons should marry and have issue male of their bodies and die before his entry into the land then his issue shall have his part*; after which D. takes wife, and had issue male in the life of the wife of the devisor. The wife of the devisor dies, D. enters into his part, and *pays his portion of 10l. a-piece to the daughters and dies*, but he not dying before entry, had but estate for life, according to the express words of the will; for marriage, having issue male, and death before entry, are three things precedent to the tail, and the words, “paying 10l. a-piece to the daughters,” makes not a fee-simple, but is intended for the same estate as is devised; and judgment accordingly. Mo. 464. pl. 656. Pasch. 39 Eliz. B. R. Bacon v. Hill.

S. P. that the devisee has fee simple by reason of the payment, without the words heirs or for ever. Br. Estates, pl. 78. cites M. 4. E. 6.

6. If a man devises 20 acres to another, and that he shall pay to his executors for the same 10l. hereby the devisee has a fee simple by the intent of the devisor, though it be not to the value of the land. Co. Litt. 9. b.

7. If the payment is to be out of the rents and profits, it is only an estate for life. Bridgm. 138. Mich. 15 Jac. Muschamp v. Bluet.

Mo. 852. pl. 1164. Anon. 8. P. & S. C. resolved that the devisee had a fee simple by

8. Lands were devised to J. S. and W. R. and they to pay yearly to the batchelor's company of merchant-taylors in London 6l. 10s. and if they or their successors deny the payment, then it shall be lawful for the wardens of the said company to enter and discharge them for ever. Resolved that J. S. and W. R. had a fee. Cro. J. 415. pl. 5. Hill. 14 Jac. B. R. Webb v. Herring.

reason of the annual payment without any regard to the largeness or smallness of the sum. — Roll. Rep. 398. pl. 25. S. C. states the word to be, to pay yearly (for ever.) Adjournatur. — Ibid. 436. pl. 1. S. C. adjudged. — 3 Bulst. 192. S. C. resolved accordingly per tot. Cur. — Bridgm. 84. S. C. states it to pay (for ever.) And judgment that the words make a fee simple, and so far as the charge is to continue for ever, it follows that the estate must continue so too; for without the estate the charge cannot be.

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9. If land be devised to one, and that he shall pay so much yearly to another and to his heirs, this is a fee simple in the devisee, for he ought to pay this for ever; and to be enabled to do this out of the profits of the land, he ought to have a fee-simple in the land; per Coke Ch. J. to which Croke J. agreed. 3 Bulst. 194. Trin. 14 Jac. Webb v. Herring.

Godb. 280. pl. 298. S. C. mentions the 3l. a year to T. his eldest son, to be paid out of the land, and adjudged a fee by reason of the collateral sums of 3l. to the brother and 20s. to the sister, which charges to the brother and sister might continue after the death of the devisee, and

10. A devise was to M. his wife for life, paying 3l. per annum. to Thomas his son during his life, and that he should take two load of wood for fireboot, and if she died before T. then he devised all his land to R. his son, paying to the said T. 3l. per annum, and paying 20s. a piece to two of his sisters; M. died, R. has a fee. Cro. J. 527. pl. 3. Pasch. 17 Jac. B. R. Spicer v. Spicer.

and adjudged a fee by reason of the collateral sums of 3l. to the brother and 20s. to the sister, which charges to the brother and sister might continue after the death of the devisee, and

if he should have but an estate for life the charge might continue longer than his own estate And so it was adjudged. — 2 Roll. Rep. 80. S. C. resolved per tot. Cur. accordingly.

11. A. seised of land, devised it to *W. his son for life, and afterwards to T. son of the said W. except the said W. his son purchased other lands of as good value for the said T. and then the said W. to have the lands so devised, to sell at his pleasure, and T. to pay his sisters ten pound a-piece; W. did not purchase land, but died: T. entered, and paid 10 l. a-piece to his sisters. Resolved that T. had a fee, for the intent of the deviser appeareth to be so through the whole will, for when it is limited to W. for life, which is an express estate, and there is no estate limited to T. but is appointed he shall pay 10 l. a-piece to his sisters, it was an apparent fee by the intent of the deviser, and is so also by the law. Cro. J. 599. pl. 23. Mich. 18 Jac. in B. R. Greeve v. Dewell.*

Hob. 65. pl. 68. Green v. Armisteed. S. C. in C. B. states the payment of the 10 l. to be by 20 s. a year. And it was insisted that besides the other part of the will, the payment of 10 l.

did also inforce a fee simple, which were clear, if the will be understood, that he should pay 20 s. a year from the death of the testator, before the estate fell into possession. But [Hobart Ch. J. said that] because he took the meaning otherwise, the paying of 20 s. yearly could be no peril unto him, because if his estate should cease, he would cease his payment; otherwise it had been to pay his 10 l. at once; but yet it would have made the legacies of 20 s. a year unto the daughters uncertain, which the testator made certain, for otherwise he would have said, that he should have paid it by 20 s. a year, if the estate came to him, and they live so long.

12. The testator's wife was secured by bond to have 40 l. during her life, and the testator having four younger sons, and four houses, devised to every of these younger sons a house, and then comes this clause, that *I have given my said houses to my said sons to this purpose, that they all shall bear part and part alike going out of all my houses, towards the payment of my wife's 40 l. per ann. which I am bound to pay.* Adjudged that the sons took only an estate for life, and no fee. Pollexf. 543, 544. cites Cro. C. 157. Mich. 4 Car. B. R. Annesley v. Chapman.

Cro. C. 157. pl. 7. Pasch. 4 Car. S. C. Resolved, that it was only an estate for life; for it is not devised (paying such a sum) which

is a sum in gross, but that every one shall pay out of his part toward the payment of the 40 l. per ann. to his wife, which is quasi an annual rent out of the profits, and consequently no fee given. — Jo. 212, pl. 5. S. C. adjudged an estate for life only. — S. C. cited Arg. 2 Med. 25.

13. *All the rest of my goods, chattles and lands I give and bequeath to J. S. to discharge all things in my will. whom I make my whole and sole executor, this gives a fee.* Ch. R. 190. 12 Car. 2. Philips v. Hele.

14. Land devised by A. to B. and gave to C. his daughter 30 l. to be paid within a year after B's marriage, and 20 l. more after B's death, and made B. his wife, executor, and *she to pay all debts which he owed.* This gave B. a fee simple, and decreed the lands to be sold to pay the debts. Chan. R. 202. 13 Car. 2. [225] Tibbotts v. Hurst.

15. A devise of *all his estate real and personal for payment of debts* is a devise in fee. Agreed by Ld. Keeper and four judges assistants. Chan. cases 196, 197. Hill. 22 and 23 Car. 2. North v. Crompton.

16. A devise of *all his estate paying 40 l. a-piece to his sisters* is a fee simple; and it appearing that *the personal estate is not sufficient* to satisfy the legacies, it must consequently be intended his real estate; besides *the devisee is not executor, and therefore it cannot be intended*

intended of the personal estate. 3 Keb. 49. pl. 23. Trin. 24 Car. 2. B. R. Moor v. Price.

I give all my houses to my wife for and towards the maintenance of B. and if she refuse to maintain him, my will is, that my executors shall enter, &c. Whether the wife had a fee the court was divided. 2 Show. 83. pl. 71. Mich. 31 Car. 2. B. R. Midwinter v. Patridge.

17. A. seised of land, devises it thus, viz. *which land I give to my son Robert upon this condition, that he pays unto his sisters 5 pounds per ann.* the first payment to be at the first most usual feast after the testator's death (the houses were 16 l. per ann.) is estate in fee. 2 Mod. 25. Pasch. 27 Car. 2. C. B. Read v. Hatton.

In some cases the word paying in a devise shall not make a fee; but if it is apparent that there is a

18. If there be a devise to one upon condition to pay a sum of money, and there be a possibility of a loss, though not a very probable one, that the devisee may be damnified, it shall be construed a fee, and such construction has always been allowed in wills. If A. devise 100 l. per ann. to B. paying 20s. it is not likely B. should be damnified, but it is possible he may. 2 Mod. 26. Pasch. 27 Car. 2. C. B. in case of Reed v. Hatton.

The devise is not that he shall allow it out of the profits. Per cur. Ibid.

less or peril of losing, a fee passes; per Ellis J. Cart. 226. Mich. 23 Car. 2. C. B. in Thacker's case.

19. Devise to A. of all his land which he purchased of J. S. and to B. the lands purchased of J. N. (being 20 l. per ann.) on condition that B. shall allow C. meat, drink, apparel and convenient lodging during his life. A. has only estate for life; B. has fee. 2 Jo. 107. Pasch. 30 Car. 2. B. R. Lee v. Withers.

2 Show. 49. pl. 35. Lee v. Stephens. S. C. It was argued, that it was a fee simple; for C. has no manner of provision else, but only an allowance of meat and drink; it is plain the testator designed the maintenance to be for C's own life, and not that when B. should die, C. should starve. And therefore it is clear that B. must have a larger estate than for his own life, for otherwise instead of having a benefit by this will, he will be damaged and prejudiced by it if he should perform the testator's will, viz. provide for C. during his life; if this were not a fee, C. must fast, and have no lodging till the quarter's rent be paid, or the profits come in, and so there would be a charge without any profit; for suppose B. should maintain C. for half a year, and then die, he would have lost by the will; C. must be provided for daily out of the land; for which reason it was adjudged by all the court, that B. had a fee simple. Pollexf. 539. Lee v. Withers. S. C. argued by Pollexfen, that it was not a fee, for that the probability of C's surviving B. and losing his maintenance, is no reason to construe it one; but adjudged that it was a fee.

Adjudged that a fee passed, though the land was 20 l. per ann. in possession, and 30 l. per ann. in reversion. 2 Show. 36. Freak v. Lea. 2 Jo. 113. S. C. adjudged, and judgment affirmed in Cam. Scacc. Pollexf. 553. to 560. S. C. adjudged, and judgment affirmed for the plaintiff, viz. that a fee did not pass; but 2 Show. 42. says, that this seems a mistake.

20. Devise of 120 l. legacy to be paid out of 10 l. per ann. within a year, and devised the lands to A. The will has not the word paying; A. has fee, and it is not a condition, but a trust to pay. 2 Lev. 249. Adjudged by three justices, but Jones J. e contra. Pasch. 31 Car. 2. B. R. Freak v. Lea.

21. A. being seised of 10 l. per ann. lands in possession, and the reversion of 34 l. per ann. more expectant upon an estate for life, devises a legacy of 20 l. to B. to be paid in 12 months out of his lands, and devises 50 l. to C. to be paid in two years, and 50 l. to D. to be paid in the space of two years out of his lands; and having two sons, W. his eldest and R. the younger, devises all his lands to R, who did not pay the legacies within the time. The court all agreed,

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agreed, that a fee was devised, because it did appear that the sum to be paid was more than the profits of the land would amount unto in that time. Freem. Rep. 479, 480. in pl. 657. Trin. 1679. Reake v. Lea.

22. Devise to *A. and his heirs* for ever, provided always and on condition that *A.* pay to *B.* 100 l. within six months after 21 years of age, and for default he devised the lands to *B.* and her heirs: And further my will is, that if *A. happens to die without issue*, the 100 l. to *B.* first paid, the remainder over to *C.* and *D.* this was but estate tail. Raym. 425. Hill. 32 and 33 Car. 2. *B. R. Wilson v. Dyson and Kipping.*

23. *A.* devised lands to *C. and his heirs for ever*; but if he die leaving no son, then he devised them to *such son of B. as B. should nominate, charged notwithstanding with such annuities, legacies, and payments as hereafter specified; and for want of any son of B. then to the eldest son of D. charged as aforesaid*; and gave his leases to *W. R.* and *T. S.* in trust for the benefit of *B.* for life, and after *B.*'s death, in trust for all *B.*'s children; and the trustees to renew the leases. And if the trustees should not provide money enough for that purpose within a month after demand, that the trustees might mortgage any of the lands of inheritance to renew the leases, and appointed *B.* the executor to pay *A.*'s wife 200 l. a year for life half-yearly, without any deduction whatsoever, and several other legacies. *B.* was likewise *A.*'s heir at law, and made residuary legatee. *C.* died an infant, without issue, in *A.*'s life-time, and *A.* died without issue. *B.* proved the will, and possessed personal estate sufficient to pay all the debts and legacies, and paid them accordingly, leaving the plaintiffs his daughters and heir. *D.* had two sons, *E.* (the now defendant) and *F.* who were living at *A.*'s death; and the question was, whether *E.* the eldest son of *D.* took any, and what estate? And Lord Somers was of opinion, that he took only an estate for life, and no more; for if lands are given to a man generally, without limiting for what estate, this makes but an estate for life, unless it appears plainly that testator intended a greater estate, which it does not here: and the monies directed to be paid by him cannot enlarge it; for they do not any of them affect his person, and so can only take an estate for life. Chan. Prec. 67. Hill. 1696. *Fairfax v. Heron.*

24. If a will is made by *feme covert* of lands of inheritance to *J. S.* and the baron dies, and then the wife, though her intention is plain, and though after the decease of the baron, when she became sui juris, she might have devised the lands to *J. S.* or by a republication have made the former will good, yet it is not relievable in equity; per *Ld. K. Wright.* 2 Vern. 475. Hill. 1704. in case of *Clavering v. Clavering.*

25. *A.* seized in fee, made his will, and gave several personal legacies, and among other, *four coats to four poor boys of the parish of A. for ever*, and then devised all his lands, tenements and hereditaments whatsoever, and likewise all his goods, chattels, money and personal estate to *M.* his wife, and made her executrix, and left 1000 L. personal estate. Per Cur. this devise to *M.* was a fee, be-

But Helt
Ch. J. held,
that the
word here-
ditament
gave the
fee, but
there being

so large a personal estate, he

cause it was *subject to a perpetual charge*. 2 Salk. 685. Pasch. 4 Ann. B. R. Smith v. Tyndall.

was not satisfied to fix the charge upon the land. Adjudged a fee. 11 Mod. 102. S. C.

And reserving 20l. a year to be paid to the *almshouses of A. for ever*. Holt's Rep. 235. S. C. — 40 s. a year. 11 Mod. 102. S. C.

* S. P. per Gould J. but Powell J. seemed to doubt of that, but held it a fee upon the reason of the perpetuity. Holt's Rep. 236. S. C.

[227] 26. In a special verdict the case was found thus, A. by his will *devises lands to B. and then bequeaths legacies*; and after two or three legacies to different persons, he *gives 5 l. to C. and directs B. to pay it, but gives him two years time to pay it*. The jury find the *lands to be 50 s. per annum*; and the question was, what estate B. had, whether for life or in fee. And adjudged to be a fee. For that the devise here was a sum in gross, and a *debitum in presenti solvend' in futuro*; and it was a sum certain to be paid by B. at all adventures, whether the land yielded full 5 l. or not; and so not like the cases where the sum devised is to arise out of the profits, &c. 11 Mod. 208. pl. 11. Hill. 7 Ann. B. R. Reeves v. Gower in C. B.

2 Vern.

687. pl.

612. Hill.

1713. Ack-

land v.

Ackland in

Canc. seems

to be S. C. and is thus, viz. A. by will devised to his brother R. all his lands, tenements and hereditaments, and all his personal estate, and whatever else he had in the world, and made him executor, desiring him to pay his debts and legacies. On a special verdict in C. P. adjudged the inheritance passed by this devise; R. the devisee was the testator's younger brother, and J. his eldest brother left a daughter.

28. A. has a *fee-simple in a light-house, and a term for years in land adjoining to it*. He makes his will, and thereby *gives to his son Henry and to his assigns, all his estate and interest in the light-house, lands, tenements, and appurtenances, thereunto belonging, upon trust, that he pays out of the rents and profits of the term, during the remainder thereof, 200 l. per annum*. Henry takes a fee simple in such part of the premises wherein the testator had a fee simple, and a term for ninety-nine years in such part of the premises wherein the testator only had such term. Barnard. Chan. R. 311. Hill. 1740. Villiers v. Villiers.

(T. a) Estate for Life in Tail, or Fee, by the Word Estate, or Land, &c.

1. A. Having three sons, *devised his lands to his three sons equally to be divided*, they have fee-simple, for if the younger had no fees they could not have estate equal with the elder, for he has fee. Cited Het. 64. per Harvey J. to be resolved the 17 Eliz.

2. Devise

2. Devise that *his eldest son should take the profits of the lands with his executors*, till his youngest son should come to the age of twenty-two years, and that then the youngest son should have the land to him and the heirs of his body, per Cur. The eldest son has fee till the youngest is twenty-two. Le. 101. pl. 130. Pafch. 30 Eliz. B. R. Gates v. Halliwell.

3 Le. 316.
pl. 286.
S. C. in to-
tidem
verbis.—
Vid. 2 Mod.
293. the
case of

Taylor v. Biddal where it is adjudged that the general heir so taking had only estate for years till the devisee should or might be of age.

3. Devise of *land to A.* without further words is estate for life, because the will would otherwise be void, which was not the intent of the devisor; for the devisee cannot be tenant at will to the *devisor, because he is dead and so his will is determined; though in case of a grant it is otherwise. Arg. 2. And. 13, 14.

So devise
of land to
A. and his
assignees, per
Coke Ch. J.
2 Bulst.
180. says it
was adjudged in C. B.
and B. R.

4. One copartner devised to a stranger *all her part and pur-
party* without expressing what estate the stranger should have, cited per Jones J. and said, that this was adjudged only an estate for life. Lat 40. Trin. 2 Car.

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5. A devise of *all his estate* passed all his lands. Sty. 308. Mich. 1651. cites Johnson's case.

6. All my *tenant-right lands* give only estate for life, but all my *tenant-right estate* gives an estate in fee. 1 Mod. 101. pl. 5. Per Hale and Wild. Mich. 25 Car. 2. B. R. Wilson v. Robinson.

2 Lev. 97.
S. C. & S. P.
as to the
words
tenant-
right estate

held accordingly.—Freem. Rep. 112. pl. 133. S. C. the court seemed that it passed a fee-simple, sed adjournatur.—3 Keb. 245. S. C. and same diversity agreed per Cur.—3 Mod. 46. Arg. cites S. C. adjudged to be a fee simple.—S. C. cited Skinn. 194. Arg.

7. That J. S. shall sell *my land*, he shall sell the inheritance. 1 Mod. 190. pl. 21. per Windham and Atkins, Mich. 26 Car. 2. C. B. cites Kelw. 43, 44. 19 H. 8. 9. [but it should be Trin. 17 H. 7.]

Cart. 230.
S. C.

8. A Devise of divers legacies in money and then followed a devise of lands. *All the rest and residue of my money, goods, and chattels, and other estate whatsoever* I give to J. S. whom I make my executor; the testator had other lands; per Finch K. Decreed that the other lands do pass. Chan. Cases, 262. Trin. 27 Car. 2. Tirrel v. Page.

9. A. seised of copyhold lands of inheritance surrendered to the use of his will, and devised thus, *all other estates of what nature soever*, I give to my wife Joan, whom I make my executor, to pay *my debts and legacies therewith*, carries a fee. 2 Show. 328. pl. 336. 395. pl. 367. Mich. 36 Car. 2. B. R. Lane v. Hawkins.

A. devised
sol. to B.
and all the
rest and re-
sidue of his
real and per-
sonal estate

whatsoever he gives to his wife, whom he made executrix, this gives a fee. 2 Vern. 564. pl. 512. Mich. 1706. Murrey v. Wife.—Ch. Prec. 264. S. C.

10. *I bear J. S. is inquiring after my death, but I am resolved to leave him nothing but what his father left him, but I leave all my estate to my wife*; there the wife took all the real estate, and the reason was, because of the other words, which shew he meant to exclude the heir at law. 12 Mod. 594. in case of Shaw v. Bull

3 Mod. 46-
the court
said, that
it plainly
appears
that the
testator in-
cites

tended nothing for J. S. and cites 3 Mod. 45. [Trin. 36 Car. 2 B. R.] Reeves v. Wintonington.

therefore he can take nothing by this will, and that devisee has an estate in fee simple; for the words (all my estate) are sufficient to pass the same.—2 Show. 249. S. C. and the Lord Ch. J. at the trial (which was on an issue directed out of chancery) said that doubtless these words in a will will carry an estate in fee and not barely for life.—Skinn. 193. pl. 7. Anon. S. C. argued, and the court inclined that the wife had a fee simple.

4 Mod 89. 11. A. seised in fee of a messuage and also of copyhold lands. Carter v. Homer. makes his will and in it are these words; *all the rest of my estate, whether freehold or copyhold, I devise one third part to my wife, and the rest to my children, equally to be divided between them.* Serjeant Trinder argued, that this carried a fee, the word *estate*, in legal signification, being the interest which he had in the land; sed altera parte minime parat' adjournatur. Show. 348. Pasch. 4. Skinn. 105. S. C. cited by the reporter and affirmed.

to be adjudged that all passed to the wife in fee, and that it was so enjoyed accordingly ex sua certa scientia.—Swinh. 152. 153. cites S. C. and says it was held that the word *estate* must in a legal signification comprehend the interest he had in those lands and by consequence pass an estate in fee.

*[229] 12. One devised *all his tenant-right* in Dale; if he had no other freehold in Dale it shall pass, secus not. 12 Mod. 594. Per Powell J. Mich. 13 W. 3. In case of Shaw v. Bull. Cites 1 Mod. 100. 3 Keb. 142, 145.

The words (all my estate) in a will pass both the thing and all the testator's interest therein. 1 Salk. 256. S. C.—Gibb. 10. Arg. cites S. C. resolved, that all my estates and hereditaments in a will give a fee.

14. As touching the *wordly estate* it hath pleased God to bestow upon me, *I give the same in manner following, Item I give to my cousin T. S. all that my parcel of land lying in Walkbam-Abbey* (being the lands in question) *Item, I give to my said cousin T. S. my wearing-apparel, linnen, books, with all other my estate whatsoever and wheresoever not herein before given and bequeathed, and him the said T. S. I make the sole executor of this my will for performing the same.* It was urged, that here he gives only his apparel, linnen, books, with his other estate, which must be construed with his other estate of the same nature, and not an estate of an higher nature. Then here the estate was copyhold, which passes by the surrender, not by the will; and when he surrenders to such uses as should be declared and expressed by his will, and in the clause by which he devises the copyhold he gives it to T. S. only, without saying any thing of his heirs; it would be a forced construction, that the words (with my other estate not before bequeathed) should enlarge the estate before expressly limited to T. S. and after these words, he adds (him I make my executor for performing my will) which words import, that he intended nothing for him by this clause, except such estate as belonged to an executor. But the court held, that when he gave all

all whatsoever, that comprehended all that he had real or personal estate; and when he had surrendered to the uses declared by his will, the will shall have the same construction as if it had passed the land itself. Adjournatur. But afterwards the plaintiff was admitted to judgment. Comyns's Rep. 337. 340. pl. 171. Pasch. 6 Geo. C. B. Scott v. Alberry.

15. A. seised of land in fee and possessed of a personal estate, gave one third part of all his estate whatsoever to his wife M. and devised to B. his son and his heirs, two thirds of all his real and personal estate upon condition to pay his debts. It was held by Raymond and Eyre Ch. J. and Jekyl Master of the Rolls, without difficulty, that by those words, a third part of the lands passed, but they conceived that the wife should only have an estate for life therein, the word estate being rather a description of the thing itself than of the interest in it, and by the next clause it appeared, that where the testator intended to give a fee he took care to add the word (heirs) to the word (estate.) 2 Wms's Rep. 335. pl. 96. Hill. 1725. at the council. Chester v. Painter.

16. A devise of all my worldly estate, as well real as personal, comprises all he had in the world and gives a fee. 2 Vern. 690. 691. pl. 615. Trin. 1715. Beachcroft v. Beachcroft.

17. A devise was, viz. *I give and bequeath all my lands and estate in C. in N. with the appurtenances to W. E. of St. M. Esq;* this gives *a fee. Abr. Equ. cases 178. pl. 18. Pasch. 1729. Barry v. Edgworth.

But if the devise had been of all his land or estate as C. in N. the

Master of the Rolls thought it would not have passed the fee, but would have been taken according to the common acceptance for his land at such a place. Ibid. S. C.

2 Wms's reports 514. S. C. decreed at the Rolls, and his honour said, that the law seemed settled in this point: by the case of Bridgewater (Countess) v. D. of Bolton.

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18. A. made his will thus, viz. *As touching my worldly estate, &c. I dispose, &c. thereof as follows, imprimis, I give my estate at, &c. to B. Item, I give my estate at, &c. to C. and then follow these words, Item, I give to M. all my estate at N. &c. with all my goods and chattles as they now stand for her natural life, and to my nephew, &c. after her death, if he will but change his name to A. If he does not I give him only 20l. to be paid him for his life out of N. &c. which I give M. upon my nephew's refusing to change his name, to her and her heirs for ever.* The question was, whether T. D. was intended to have an estate for life only, or in fee; Ld. C. Talbot was of opinion, that those introductory words prove the testator to have had his whole estate in view, and that taking the words in the first sense will make only a partial disposition and leave a chasm, whereas taking them in the last sense will make a compleat disposition of the whole, and that this clause of the devise to M. and T. D. depends upon construction of the word estate, which will be clear from the sense he hath taken it in through all the other parts of his will, where, whensoever he has used it, he has meant thereby to pass the inheritance, and though the word (estate) in common speech may not mean an inheritance, yet it is clear he has meant it so here; and though the limitation to M. in the first instance was for life, yet the devise to T. D. was

in general words, he thought this could make no difference, and that no great stress could be laid upon the incorrect wording, and that the intent plainly appearing to pass the inheritance, he decreed an estate in fee to T. D. Cases in equity in Lord Talbot's time. 157. Mich. 1735. Ibbetson v. Beckwith.

19. The words (*I devise all my temporal estate*) are the same as (*I devise all my worldly estate*) and pass a fee and this is the plain-er, where it is afterwards said, *all the rest of my real estate* the word (rest) being a term of relation. 3 Wms's Rep. 295. Trin. 1734. Tanner v. Wife.

20. Lord Chancellor said, he did believe that there were cases where this word *estate* has been held to signify barely the land itself. But all these cases depend upon their particular circumstances, and the evidence of the testator's intention arising from these circumstances. Where the words were, viz. *What I have I intend to settle in this manner*. This shews that he intended to dispose of his whole interest in the premises, and it is as strong as if the testator had said, *all my estate I dispose of in this manner*; and the case is stronger because of the word *settle*, by this expression the testator shews his intent to make a settlement of his whole estate. Barnard. Chan. Rep. 14, 15. Pasch. 1740. Tuffnell v. Page.

[231] (U. a) Estate for Life, in Tail, or Fee, by the Word Heir, or each other's Heir.

1. **D**EVISE to *A. and his wife et hæredi de corpore & uni hæredi tantum* was adjudged an entail, per Hale Ch. J. Vent. 228. cites 39. Aff. 20.

2. Devise to *A. for life remainder to B. and his heirs males* is a fee and no entail. Cro. E. 478. in case of Abraham v. Twigg cites 9 H. 6. 25.

S. C. cited,
Arg. Palm.
133.

3. Note, if a man has issue three sons and devises his land, and likewise one part to two of the sons in tail, and other part to the third son in tail, and that none of them sell any part, but that each shall be heir to the other, and dies; in this case, if one dies without issue, his part shall not revert to the eldest son, but shall remain to the other sons; for these words (that each shall be heir to the other) implies a remainder, because it is one will, which shall be intended and adjudged according to the intent of the devisor. Br. Devise, pl. 38. cites 7 E. 6.

4 Le. 37.
pl. 101.
Conie's
case S. C.
in totidem
verbis.—
Ibid. 213.
pl. 345.
S. C. in totidem verbis.

4. Devise that the wife shall take the profits of his land till *M. his daughter and heir* come to the age of sixteen years, and if *M. died* that *J. S. should be her heir*. Manwood held that this is estate in tail to *M.* But Mounson and Harper held, that it is but estate for life. 3 Le. 55. pl. 80. Mich. 15 Eliz. C. B. Coniers's case.

5. If a devise be made to *A. for life*, and after to the *heir of A. for life and so from heir to heir* for ever for life. Here are two estates for life and the other devisees have fee; for estates for life cannot be limited by general words from heir to heir, but by special words they may; per Wray Ch. J. Le. 258. pl. 345. 18 Eliz. B. R. in case of Manning v. Andrews. Devise to *A. for life, and after to his heir* (in the singular number) this is an estate in fee, but if it be *and to the heirs of such heir*, (such) there is a contingent remainder; per Holt Ch. J. Skin. 559.—Heir is *nomen collectivum* and in a will contains heirs and heirs of the heir and gives a fee. Skin. 563, 564. In case of Bevison v. Husley.

6. Devise to *A. for life*, and so after to *every person, that should be his heir, for life only*, this was adjudged estate in possession to A. and remainder for life to the next heir and not to any more. Mo. 372. Arg. cites 28 or 18 Eliz. C. B. Haddon's case.

7. A. seised of lands in question, had issue B. C. and D. and had other twenty acres of land in fee, and devised to C. ten acres of the twenty, and to D. the other ten acres. And then devised to B. his other lands, (the lands in question) and said, that when B. should die without heirs of his body, that C. *should be his heir*, and D. should have his part, and if either C. or D. should die, that then one of them *should be the other's heir*, and died; B. died without issue. C. died leaving issue E. upon whom D. entered, but adjudged for E. If by my will I appoint, that *J. S. shall be heir of my land*, he shall have it in fee; for such estate as the ancestor had, such he is to inherit, and therefore the said word (heir) in the latter clause between C. and D. shall give an estate for life to the survivor, because the brother to whom he is made heir had but an * estate for life before. Hob. 75. pl. 93. Hill. 11 Jac. Spark v. Purnell. Mo. 864. pl. 1190. Spark v. Purnell. S. C. Mich. 13 Jac. C. B. the testator was seised of gavelkind and had issue three sons and devised part to one, part to another, and another part to the third, and devised, that if any die without issue that the other should be his heir. This was adjudged an estate tail in each, and a fee simple by the word (heir) to the other. And says it was so adjudged, Hill. 32 Eliz. C. B. in Carter's case.

8. A. devises that *B. shall be his heir*; C. devises lands to A. and his heirs. B. shall have these lands as heir to A. Arguendo. 2 Sid. 27. cites 1 Car. Rot. 189. alias 149. Sander's case. * [232] Their words give a fee. Agreed Arg. and said it had been so adjudged Lat. 9.

9. The father having three daughters *A. B. and C. devised his lands to his wife till his heir came of age, paying to his heir 10 l. per ann.* and to his other children 20 s. a-piece to the same time. Item, he devised to his two youngest daughters B. and C. 140 l. a-piece; and that if A. his heir dies without heirs before 21, so that the lands shall come to B. then she to pay the 140 l. which was devised to her. The court held, that A. should have all the lands, exclusive of her sisters, by the words in the will calling her his heir, and frequently in the will mentioning his heir in the singular number; but by the last words, "If A. his heir dies without heir, so that the land shall come to B. then B. to pay the portion which she herself ought to have had," is only estate tail, and not a fee simple. 4 Lev. 162. Hill. 27 & 28 Car. 2. B. R. Tilly v. Collier. 3 Keb. 589. pl. 25. S. C. adjudged.—S. C. cited Arg. Ld. Raym. Rep. 569.

10. A. deviseth to B. and C. brothers, several parcels, and if either die, that the other should be his heir; B. dies. The question was, whether C. should have the fee, or only an estate for life? And to that this diversity was taken, that when a fee was devised to A. and that if A. died B. should be his heir, there B. should have a fee; but when A. had but an estate for life by the devise, there B. should have but for life by way of executory devise, cites Hob. 75. 1 Roll 836. But Serjeant Maynard said, that when the case is *betwixt brothers*, there these words may pass an inheritance, because they, by intendment, may be heirs to one another; but if the case were *betwixt strangers*, there, to say that the other shall be his heir, is no more than to say, that he shall have the estate which the other had; but the court inclined that C. should take but an estate for life. Sed adjournatur. Freem. Rep. 293. pl. 344. Trin. 1677. Gynes v. Kemley.

11. Land was devised to J. S. and his heirs during the life of A. in trust for A. for life, and after the decease of the said A. I give it to the heirs males of the body of A. now living, who has a son named B. A. takes only an estate for life, and the remainder executes in B. 2 Lev. 232. Mich. 30 Car. 2 B. R. James v. Richardson.

Ibid. says, that this judgment was reversed in Cam. Scacc. but that the reversal

was reversed in Domo Procerum.——Vent. 334. S. C. accordingly.——2 Jo. 99. S. C. accordingly.——Vent. 330. S. C. accordingly, as adjudged in B. R. and reversed in Cam. Scacc. but does not mention the reversal of the reversal in parliament.——2 Vent. 311. Burchett v. Durdant, a new ejectment was brought on the same title, and judgment was given accordingly in B. R. and affirmed in Cam. Scacc. and afterwards in the House of Lords.——Carth. 154. Burchett v. Durdant. S. C. affirmed in exchequer chamber, and in parliament.——Carth. 155. and held clearly, that the words *now living*, were sufficient description of the person of B.——2 Lev. 232. in a note at the end of the case accordingly.——Comb. 153. S. C. but no judgment.——Pollexf. 457 to 469. S. C. adjudged in B. R. reversed in Cam. Scacc. and that reversal reversed in Dom. Proc.——S. C. cited by Ld. Chancellor. 2 Vern. 734. H. L. 1716.——S. C. cited 2 Ld. Raym. Rep. 878. Pasch. 2 Ann.

[233] 12. Devise to A. and such heir of her body as shall be living at her death, and for default of such, remainder to B. is estate tail. 2 Vern. 324. pl. 314. Mich. 1695. Richards v. Bergavenny. Devise to A. for life, remainder to the heir of his body, (though in the singular number) is estate tail, but if he goes on and says, and to the heirs of the body of such heir, there A. is but tenant for life. Ibid. 325. cites Asher's case. 1 Rep. 66.——Le. 257. per Geoffry J. in case of Mannings v. Andrews.

Robinson of ga. alkind. 96. S. C.

13. Sir Thomas Trollop devised the manor of A. to his first son William for life, remainder to the heirs males of his body, remainder to his second son Thomas for life, and after his death to the first heir male of his body, remainder to his third son Christopher, and the heirs males of his body, remainder in like manner in tail to the fourth, fifth, &c. sons.

In an ejectment brought on the said case, Eyre Ch. J. pronounced the resolution of the court. The case entirely depends on the will of Thomas Trollop, grand-father to the defendant, and the question arises upon the words following. He devises the manor of, &c. to his son Thomas Trollop, for life and after to his first heir male of his body lawfully begotten, and for want of such heir male, remainder over. We are of opinion that Thomas Trollop had by this devise an estate tail, consequently the defendant is entitled as heir male of Thomas Trollop. 1st. We will consider if the

the devise had been to A. and the heir male in the singular number. 2dly, Whether, as an express estate for life is devised before the words heir male, it varies the case. 3dly, Whether the word (*first*) makes any alteration. 4thly, The legal operation of the words (*for want of such heir male.*) He considered the two first points together, to A. for life, and after to the heirs male of his body, remainder over; the *first devisee takes an estate tail, notwithstanding the express estate for life.* This has been often adjudged in a will, and it is not necessary now to consider how it would operate in a deed; the words heirs are necessary to make an inheritance in grants. Littleton, Sect. 1. It is not to be inferred from thence that Littleton intended, that if the word heir in the singular number, was made use of, that it would not be an estate of inheritance; though Coke, 1st. Inst. 8. b. is of opinion, that if land is given to a man and his heir in the singular number, he hath but an estate for life, yet that opinion of Coke is not warranted by any thing in Littleton, and directly contrary to 39 Aff. S. 20. where lands were given to a man and his wife, and one heir of their bodies. This was held an estate tail, which could not be unless the word heir in the singular number gives it a descendible quality; the same regisrum judicial' gift made to a man, and hæredi masculo held an estate tail, and Co. in fo. 22. a. seems to be of the same opinion, and the reasons 1 Inst. 8. are of no great weight to me. If a testator gives to A. for life, and after to heir male, he intends an estate tail, viz. a descendable estate, and often so adjudged. Cro. Eliz. 313. CLERK v. DAY. 1 Rolls Abr. 832. 839. 2 Rolls Abr. 417. Moor. 593. Ow. 198. (there is no resolution in that case, prout record 39 Eliz. Rot. 467.) Sir T. Jones III. 113. GOULD v. GODDARD, That heir male is of the same sense with heirs male. 1 Bulst. 219. 1 Roll. Abr. 836. Stiles 249. 273. 1 Rolls Abr. 627. PAWSEY v. LOWDALE, a very strong case; where heir in the singular number is nomen collectivum, and all one with the word heirs, the case did not turn upon the words for ever.

Indeed devise to father for life, and after to next heir male, and the heirs male of such heir male, this has been held to be only an estate for life in first devisee, this is ARCHER's case, 1 Rep. [66.] 2 Anderfon [37.] But the reason of that resolution is, because words of limitation are grafted, and annexed to the heir male, though in the report book the reason of the resolution of that case is said to turn on the word (next) as descriptio personæ; but this is not the true reason, but the foundation of such resolution was as aforesaid; Hale Ch. J. has taken notice of the true reason 1 Vent. 215. because the words of limitation were annexed to the word heir, therefore (*heir*) was taken to be but *designatio personæ*; from hence it appears that devise to A. for life, and *his heir male* in the singular number, and to A. for life, and *his heirs male* in the plural number, is the same; and although an express estate for life is devised, yet it shall be an estate tail. 1 Vent. 214. KING v. MELLING. Then let us consider the third point, whether the word first varies the case, we are of opinion that a devise to A. and

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his

his first heir male, and to A. and his heir male is the same, to the first son is different, for he is well described and will take by remainder in his father's life; but heir male cannot take effect till after the death of the father. The case of LOVELACE v. LOVE- LACE Cro. Eliz. 40. cited contra is quite different, for there it is eldest issue male, the word eldest is a particular unvariable description, but the word first is not so.

A writ of error was afterwards brought in B. R. but upon the first argument, the court seemed clear afterwards the judgment was affirmed.

As to the 4th point, if the preceding words were not strong enough to create an estate tail, these would be effectual to carry such an estate, the words for *want of such issue*, or if he *die without issue*, or for *default of such heir male*, have raised by implication an estate tail. 1 Vent. 230. BARLEY's case, and ROBINSON's case, 231. BIFIELD's case, so judgment for the defendant, who claims as heir male of the body of Thomas the son. MS. Rep. Trin. 1734 C. B. Dubber v. Trollop.

(W. a) Estate for Life in Tail or Fee. By the Words to Give, Sell, Dispose, &c.

Cart. 232.
S. C.

1. **T**HAT J. S. shall *sell* my land. He shall sell the inheritance. 1 Mod. 190. in pl. 21. cites Kelw. 43, 44. 19 H. 8. fol. 9.

S. C. cited
Mod. 190.
—Le. 156.

2. Devise to A. to *give, sell, and do therewith at his will and pleasure*, is fee simple. Br. Devise, pl. 39. cites 7 E. 6.

Whiston v. Cleyton.—Le. 283. Jennor v. Hardy.—Bendl. 11. pl. 9. 24 H. 8 Anon.

Dal. 58. pl.
5. S. C.
held accordingly.
Ow. 32.
Pasch. 6
Eliz. Anon.
S. P. by
three jus-
tices, and
seems to be
S. C.—

3. A. devised lands *to his wife* [ea intentione] *to dispose and employ them on her and his son at her will and pleasure*; per Dyer, Weston and Welsh, this gives a fee; and Dyer and Welsh held, that the estate in her is *conditional* because of the words ea intentione, which make a condition in every devise, though not in feoffment, gift or grant, unless in the king's case, and the words amount to as much as if he had said, so that she shall not give it over to a stranger, but to hold this or give it over to his son, Mo. 57. pl. 162. Pasch. 6 Eliz. Anon.

6 Mod. 111. Hill 2 Ann. B. R. Holt Ch. J. cites S. C. [but it is misprinted there as pl. 165 instead of pl. 162.]

4 Le. 41.
pl. 110.
S. C. in
totidem
verbis.—
S. C. cited
1 Mod. 189.
in case of
Liese v. Saltingstone.—

4. Devise *to his wife for life, and after her decease to give the same to whom she will*; the wife has but estate for life, but has authority * to give the reversion to whom she please. But if an express estate had not been devised to the wife, by the other words an estate in fee should have passed. 3 Le. 17. pl. 108. Hill. 29 Eliz. C. B. Anon.

*[235]
S. C. cited
per cur.—

5. Devise of copyhold lands thus, I devise *to A. my house in M. to B. my house in N. to C. my house in O.* Moreover, *if the said A. B. and*

B. and C. live till they are 21, and have issue of their bodies lawfully begotten, then I give the said houses to them and their heirs in manner aforesaid, to give and sell at their pleasure, but if one die without issue of his body, &c. then the other brothers or brother shall have all the said houses in manner as aforesaid, and if the three die without issue in like manner, then to be sold by his executors, &c. no estate tail is created by the will, but when they come to their lawful age and have issue, the fee simple is settled in them, so as the residue of the devise is void, by the first words of the will, it was agreed, that the three devisees had but for their lives. 2 Le. 68. pl. 22. Trin. 27 Eliz. C. B. Brian v. Cawfen.

6. Devise to A. his wife on condition she should not marry, and if she died or married, then the land should remain to A. in tail, and if A. died without issue of his body in the life of the wife, that then the land should remain to the said wife to dispose thereof at her pleasure, and if the said A. survived the said wife, then the land should be divided between the sisters of devisor; A. died without issue, living the wife, the wife has a fee simple. Le. 283. pl. 383. Hill. 29 Eliz. C. B. Jenner v. Hardies.

7. A. seised in fee devises all his lands to A. his godson, after the death of his wife, and if he failed, then he willed all his part to the discretion of his father. This is a fee-simple to the father. Le. 156. pl. 219. Mich. 30 & 31 Eliz. C. B. Whifkon v. Cleyton.

8. Devise to A. to dispose at her pleasure, and to give it to one of my sons, to which she pleases; per two Justices it gives estate for life, with power to dispose of the fee to one of the sons; by two other justices it gives fee, but only ties her, that if she aliens it must be to one of the sons. Lat. 9. 39. 134. Hill. 1 Car. and Trin. 2 Car. Daniel v. Upley.

wife had not but a power. Noy. 80. S. C.

A man devised his land to another to give, sell, or do therewith at his will and pleasure; this is a fee simple; for his intent shall be taken to give a fee simple. Br. Devise pl. 39. cites 7 E. 6. Br. N. C. pl. 432. cites Br. Devise, 38. [but all the editions of Br. are pl. 39.] and cites 19 H. 8. 9. [b]y Norwich, Fitzherbert and more.

If a man devises land by such words, viz. to him, and to his, or to him to do his pleasure therewith, it was the opinion of Fitzherbert and others of C. B. that the devisee in such case had a fee simple in the said land. Bendl. 11. pl. 9. 24 H. 8.

S. C. cited by Jones J. Lat. 40. in case of Daniel v. Upley, and said he had seen the same wrote by the hand of Warburton J. but he said if it was barely thus, viz. I devise lands to dispose at will and pleasure, it shall be intended of the profits only. And says, that this case differs from the case in Br. N. C. 432. and Br. Devise, 38. [39.] because there it is to dispose at will and pleasure, as in this case of Daniel v. Upley, but there it is added (and to sell, &c.) which is not in this case, and that clause made the case there to be a fee simple.

9. A. devised to M. his wife for life, and by her to be disposed of to such of my children as she shall think fit; M. disposed of the lands to the younger son and his heirs. By the opinion of three judges the disposal was adjudged good; but Vaughan Ch. J. held that M. having only an estate for life given to her, she could not dispose of a greater. Mod. 189. pl. 21. Mich. 26 Car. 2. C. B. Lieve v. Saltingstone.

but that Windham and Ellis held, (as serjeant Wilmot reported to him) that she could dispose no more than for her own life; et adjournatur.—Cart. 232. Anon. S. C. Vaughan Ch. J. insisted that the word (dispose) cannot signify give; for none can dispose of more than he has, and here the wife has only an estate for life. And if the words were to be transposed equivalently,

2 Lev. 104. Saltonstall's case. S. C. says, that Vaughan and Atkins held, that she might dispose of the fee,

S. C. cited Freem. Rep. 176. in case of Leece v. Saltingstone, per Cur. Jo. 137. Trin. 11. Car. B. R. S. C.—S. C. cited Sty. Arg. 159. Adjudged that the

lently, viz. "I will and bequeath the lands in question at my wife's dispose, to such of my children as she shall think fit," the children do not take it expressly by the gift of the testator; and the words (at her dispose) are with relation to the children, and not to the estate; and when she hath disposed of it to any child, that child shall have but an estate for life; and she has the nomination and specification of the person. And he said sub-irascens, sententia numerantur, non ponderantur.—*Freem. Rep.* 149. pl. 170. S.C. argued, sed adjournatur.—*Ibid.* 163. pl. 180. S.C. argued; and Vaughan and Atkins seemed to incline that she had power to dispose of an estate for life only; but Windham and Ellis e contra; sed adjournatur.—*Ibid.* 176. pl. 189. S.C. adjudged by three justices, contrary to the opinion of Vaughan, that she might dispose of the fee.—1 *Salk.* 239, 240. Pasch. 10 Ann. B.R. *Thomlinson v. Dighton. S.P. and Parker Ch. J.* in delivering the opinion of the court said, that this was only an estate for life to the wife, but that the disposing power was a distinct gift; because the estate given is express and certain, and the power comes in by way of addition, and is a separate gift distinguished from the estate.

10. Devise to A. to sell and dispose for payment of debts passes a fee; per Lord Hutchins, cites *Crompton v. North.* 2 Vern. 153. Trin. 1690. *Claxton v. Claxton.*

Lat. 137.
S. P. Per
Doderidge

11. Devise to dispose at will and pleasure is fee. 6. Mod. 111, Hill. 2 Ann. B. R.

J. but contra per Jones J.—Lat. 40. cites that Whitlock J. held it to be a fee.

12. Where lands are devised to a particular purpose, and that the death of the devisee may prevent that purpose, there the devisee shall have fee; per Holt Ch. J. 6 Mod 111. Hill. 2 Ann. B. R. cites 6 Rep. Collier's case.

The disposing power is a distinct gift, because the estate given is express and certain, and the power comes in by way of addition. *Ibid.*—*Wms's Rep.* 149. pl. 41. S. C. in B. R. adjudged accordingly that the wife has only an estate for life, with power to dispose of the fee, and the judgment in C. B. was affirmed—10 Mod. 71. S.C. held accordingly per tot. Cur. in B. R.

13. Devise to A. for life, and then to be at her disposal to any of her children, who shall be then living, gives estate for life, with power to dispose of the fee. 1 *Salk.* 239, 246. pl. 19. Pasch. 10 Ann. B. R. on a writ of error on a judgment in C. B. *Tomlinson v. Dighton.*

See cases in Chan. in Ld. King's time. 81. Trin. 1733. S. C. decreed no resulting trust.—1 *Wms's Rep.* 193. S. C. decreed accordingly.

14. A. among other legacies gives a legacy of 5 l. to B. his brother and heir, and then makes his beloved wife C. his sole heiress and executrix of all his lands, tenements, goods and chattels, the same to sell and dispose of as she should think proper, to pay his debts and legacies. This is a gift to her of the surplus in fee, and there is no resulting trust for the heir. Cases in Chan. in Ld. Talbot's time 268. Mich. 4 Geo. 2 *Rogers v. Rogers,*

(X. a) Estate for Life, in Tail, or Fee, by the Words, equally to be divided, &c.

1. DEVISE of a house to three brothers among them, provided always that the house be not sold, but go to the next of the name and blood that are males; this is estate tail in every of their parts. D. 333. b. pl. 29. Pasch. 16 Eliz. *Chapman's case.*

1. A.

2. A. seised of three houses, devised them to his wife for life, remainder of one to B. his son and his heirs, remainder of a 2d to C. his daughter and her heirs, remainder of the 3d to D. his daughter and her heirs, and if any of his said issue died without issue of his or her body, then the other surviving should have totam illam partem, &c. between them equally to be divided; C. dies leaving issue (husband and wife being dead before) then B. the son dies without issue; C. has a moiety of her brother's house in fee (not by the will but by the common law.) If the first sister had died without issue, the brother had had a fee executed of one moiety, and a fee expectant of the other, and the surviving sister only estate for life. If the son had died, living the two sisters, they would have had fee in their brother's house, not by the will, but by descent as coparceners. 2 Le. 129. pl. 171. Mich. 29 Eliz. B. R. Hawkins's case.

2 Le. 193. pl. 243. Pretiman v. Cook S. C. accordingly.

—3 Le. 180. pl. 232. Putnam v. Cook. S. C. accordingly, and all in almost all the same words —

Cro. E. 52. pl. 2. Pettywood v.

Cook. S. C. all the justices held, that by a devise an estate for life only is limited to the survivor and the fee descends by course of law as well to the issue of C. who first died, as to the survivor, and that the words *totam illam partem* refers only to the house and not to the estate in it, and so the estate limited over by the will is no more than an estate for life. — S. C. cited Arg. Cro. E. 695.

3. A seised in fee of an house and possessed of goods, devised in these words; *the rest of my goods and lands and moveables whatsoever, after my debts, legacies, and funerals paid, to my 3 children B. C. and D. equally to be divided among them*; adjudged they have estates but for life in the house, and are tenants in common. Mo. 594. pl. 804. Trin. 35 Eliz. Deacon v. Marsh.

The devise as reported by Cro. was thus, viz.

A. devised all his lands and goods after his

debts and legacies paid to R. B. and M. his children, equally to be divided among them. Adjudged that only an estate for life passed, though R. B. was heir at law. Cro. E. 330. pl. 5. Trin. 36 Eliz. B. R. Dickins v. Marshall — S. C. cited by Popham. Cro. E. 696. Mich. 41 Eliz. B. R.

4. Devise to two sons, to be equally divided amongst them; the eldest has fee, and the youngest only an estate for life. Lat. 136. cites it as ruled in the case of Dixon v. Marsh.

Nel. Ch. R. 73. Taylor v. Hodges. S. P.

5. Devise to four sons; adjudged that the three younger had but an estate for life, and the elder being heir, the inheritance belong to him. 3 Ch. R. 87. cites 4 Car. 1. as the case of Taylor v. Hodges.

N. Ch. R. 73. cites S. C. — but where it has these words, *as*

be equally and indifferently divided between them at their own proper costs and charges; it was held they were tenants in common for life, and have the fee simple of one moiety in possession and the reversion of the other moiety. Bull. 113. Pasch. 9 Jac. Newman v. Edmunds.

6. Devise to A. (his eldest son) in tail, on a limitation to cease for non-payment, remainder to B. in tail male, and so to C. and D. and upon ceasing of A's estate by failure, then to B. C. and D. and to their several heirs for ever, as before is limited, equally to be divided amongst them. On A's failure this devise wholly revokes and controuls the other remainders for the former part, and leaves the fee simple expectant in the heir of the devisor; per Bridgman Ch. J. in delivering the opinion of the court, and judgment accordingly. Cart. 175. Hill. 18 & 19 Car. 2. C. B. Rundale v. Ely.

7. B. devises to C. and D. and if either died, the other should be his heir. The question was, whether C. or D. had an estate for life or in fee? And it having been argued by serjeant Borril that they had but an estate for life serjeant Maynard was to maintain

tain that he had a fee, but he threw it off upon another point. Freem. Rep. 235. pl. 244. Mich. 1677. C. B. Gyles v. Kempe.

8. Devise to A. for life, the reversion to B. and C. to be equally divided between them; decreed a tenancy in common for life only; so if B. had been heir at law, C. would take estate for life only. Vern. 65. pl. 61. Mich. 1682. Peiton v. Banks.

Skinn, 339.
pl. 5. Middle-
ton v.
Swain. S. C.
adjudged
accordingly.
—S. C.

cited Arg.
Skinn. 563.
Mich. 6 W.
& M. in

9. A. devises seven several shares in the New-river water to his several children (by two venters) in fee, provided that if any of them die under age or unmarried, then the part or share of him or her so dying, to be divided among the survivors, share and share alike. One of the devisees dies; the survivors are tenants in common of that part for life only, for the word share doth not denote the interest but the quantity. Comb. 201. Pasch. 5 W. & M. in B. R. Middleton v. Swail.

B. R. as ruled, that the words (totam illam partem) without the limitation of any estate, carried only an estate for life. Affirmed in Domo Proc. Parl. cases 211. Swain v. Lane and Faulkner.

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M. S. Rep.
Mich. 18

Ann. Canc. Bullock v. Bullock.

10. Bill to have an account of the real and personal estate of their father, and a partition of his real estate.

Case; B. having several freehold and copyhold lands, devises all his lands, goods and chattels to his three sons, equally to be divided between them, and devises over and above this 100 l. to his eldest, provided he gives a lawful good, and general release to his two younger brothers, by his codicil appoints, that if one of his younger sons should die, or marry in his minority without consent of his executors, then his portion to go to the other younger son.

1st Point. If the younger sons have an estate for life only, or an estate of inheritance by this devise?

Harcourt C. there being no words of limitation of estate in the devise to the two younger sons, they can take only an estate for life in the lands, and as to the general release directed by the will to be given to the two younger sons, that is satisfied by releasing his right to the personal estate without affecting the real estate, so the devise over to the younger son in case of death of one under age, &c. may be satisfied, by the personal and the word (portion) properly signifies nothing.

MS Rep.
3 Geo. in
Canc.
Thurstout
v. Peak
& al.

11. In ejectment upon the demise of Edmund Miller against the defendants for lands in Norfolk, a special verdict was found to this effect, viz. that Roger West was seised in fee of the lands in question, and by his last will in 1697, devised the same to his wife during her widowhood, and then in these words, viz. I devise the same after the decease or marriage of my said wife as aforesaid, unto Edmund Miller and Robert Sharrock during their natural lives, equally to be divided between them, and after their deceases, then to the next heirs male of their bodies lawfully to be begotten, equally to be divided between them; but in case either of them the said Edmund Miller and Robert Sharrock departed this life without such issue, then I devise the same estate with the appurtenances to the other of them for life, and after his decease to the heirs males of his body lawfully to be begotten, with divers remainders over, with a proviso, that if his said wife, or

any of his devisees should cut down or sell any timber growing upon the lands devised, other than for repairs and fire-wood for themselves and family and their respective tenant's use to be spent on the premises, that then they should forfeit their several and respective estates, and that the said *Edmund Miller and Robert Sharrock* did by their deed for themselves and the heirs male of their bodies, make partition of the said lands, that they and the heirs male of their bodies should have and hold the said lands in severalty, but for no greater or other estate than they might take by the said will, and that *Sharrock* levied a fine and suffered a common recovery of the lands allotted to him and died without issue, and that the defendants entered as heir to the said *Sharrock*.

Reeves for the plaintiff argued, that *Miller* and *Sharrock* had by the will estates for life only, the devise being in express words to them, during their natural lives, and that the following words, viz. after their deceases, being in the plural number, shewed the testator's intent to be, that the heirs male of their bodies should not take till both *Miller* and *Sharrock* were dead, and that the words equally to be divided between them made them tenants in common, and that each of them had by implication of law a remainder for life of the other's moiety, otherwise the survivor of them could not take the other's moiety, which appeared to be the intent of the testator from the said words, after their deceases. 2dly, That the proviso in the will shewed that the testator intended them estates for life only, for if he had intended them estates in tail, he could not have restrained them from cutting down or selling the timber, and that the partition made no alteration in their estates, because by it they were to have no greater or other estate than they took by the will, and that therefore *Sharrock* by levying the fine, and suffering the recovery forfeited his estate.

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Braithwaite serjeant argued for the defendants, and upon the first argument, *Parker Ch. J. Eyre* and *Pratt* (*Powis* absent) were clear and resolved, that *Miller* and *Sharrock* had by the will estates tail in common executed in them, and held that their estates were in common, because the words *equally to be divided* between them, are sufficient in a will to make a tenancy in common, though they are not so in a deed, and that those words being applied as well to the estates given to their heirs male as to the estates given to them, made the estates tail estates in common, and that the tails were executed in them, because estates for life being limited to them, *heir in this case is a word of limitation, and that the words (after their deceases) were to be taken respectively* (i. e.) that after the decease of *Miller*, his moiety should go to the heirs male of his body, and after the decease of *Sharrock*, his moiety should go to the heirs male of his body, and that the proviso was no proof that testator intended *Miller* and *Sharrock* estates for their lives only, because the testator intended that proviso to be extended to all his devisees, and if *Miller* and *Sharrock* took only estates for life, yet their heir males would be devisees in tail, and his own right heirs to whom he gave the fee were devisees. Judgment per *Quer.*

(Y. a)

(Y. a) Estate for Life, in Tail, or Fee, by the Words Sons, Children, Issue.

1. **W**HERE a man devised *lands to his two sons equally*, it is left a quære, whether they are jointenants, or tenants in common. Bulst. 113. per Cur. cites 34 H. 6. 2. and 28 H. 8. D. 25.

S. C. cited
Vent. 231.

2. A. devised land to B. for term of his life, and after his decease to the men-children of his body, and if B. dies without any man-child of his body, then to remain to C. A. dies; B. dies without issue male of his body. Held that B. had estate to him and the heirs male of his body. And. 43. pl. 110. Hill. 6 Eliz. Anon.

Cro. E. 40.
pl. 1. Love-
lace v.

Lovelace.
S. C. states
it that A.
had no son
at the time;
and adjudg-
ed an estate

for life only, and if he then had a son, 'twas all one; but a devise to B. and his issue male, is an estate tail; but here the word eldest will not permit the construction.—2 Le. 35. pl. 45. S. C. adjudged that no estate passed but an estate for life to A. the remainder to his eldest son for life.—Sav. 75. pl. 154. S. C. agreed by all the justices.—S. C. cited as adjudged accordingly.

[240] 4. Devise to A. and if he die without issue, that this shall remain to B. is tail; but 'tis not so if his death without issue be limited within a certain time, as before 24 years of age, or in life of another. Per omnes J. Mo. 464. pl. 656. Pach. 39 Eliz. B. R. Bacon v. Hill.

he has express estate for life, yet it is as fully expressed in the will, that until A. dies without issue, B. shall take nothing; and therefore for mere necessity the issue of A. after the death of A. must take the land, and consequently it is the same as if the devise was to A. for life, remainder to the issue of A. which makes estate tail in a will to A. if A. had no issue at the time. Wms's Rep. 758. Arg. in case of Attorney General, &c. v. Sutton and Paman.

Mo. 397.
pl. 519.
Richardson
v. Yardley.
S. C. per
two justices
it is estate

tail; but per the other two, 'tis only estate for life.—S. C. cited as adjudged accordingly. Bridgm. 85.—S. C. cited Vent. 215. in case of King v. Melling; per Hale Ch. J. and ibid. 229. Hale agrees that they take by way of remainder, and says that this was the only point adjudged in Wild's case, and there also against the opinion of Popham and Gawdy. And ibid. 230. Hale says, that if in that case the devise had been to the children of their bodies, it would have been an entail. And ibid. 231. Hale cites S. C. and says that the court of B. R. were at first divided, but that indeed afterwards it was adjudged an estate for life to A. and his wife; 1st, Because having limited a remainder in tail to B. by the express and usual words, if he had meant the same estate in the second remainder, it is like he would have used the same words; 2dly, It was not after their decease to the children of their bodies; for then there would be an eye of an estate tail. 3dly, The main reason was, because there were children at the time of the devise;

devise; and that was the only reason the resolution went upon in the Exchequer Chamber. And though it be said in the latter end of the case, that if there were no children at that time, every child born after might take by remainder; it is not laid positively that they should take; and it seems to be in opposition to their taking presently; but however that be, it comes not to this case; for though the word children may be made *nomen collectivum*, the word issue is *nomen collectivum*.——2 Lev. 58, 59. Arg. cites S. C.

6. Devise to *A.* and after his decease to his children, shall take by Mo. 397. way of remainder. 6 Rep. 17. b. Hill. 41 Eliz. B. R. Wild's pl. 519. Hill. 37 Eliz.

Richardson v. Yardley. S. C. per Popham this is an entail.——Gouldsb. 139. pl. 47. Hill. 43 Eliz. Anon. seems to be S. C. and Popham and Gawdy were of opinion, that they had an estate tail; but Fenner and Clench thought that they had for life only.——Devise to trustees and their heirs in trust for *B.* for life, remainder to the children of *B.* by her then husband in trust that they shall have the profits thereof when they come of age. The children will take a fee as tenants in common. 9 Mod. 104. Bateman v. Roach.

7. Devise to *A.* and if he die, having no son, that it shall remain Devise to to *B.* for life, and if he die without issue having no son, it shall A. and if he dies not remain to the right heirs of devisor; *A.* has estate tail to issue male; B. has but for life, or at least to the heirs females, because having no son is merely contingent; per Popham. Mo. 682. pl. 939. Mich. 42 and 43 Eliz. Milliner v. Robinson. Ch. J. Vent. 231. cites Hill. 42 and 43 Eliz. Bifield's case.——2 Brownl. 271. Trin. 7. Jac. C. B. Robinson's case.

8. Devise to *A.* for life, remainder to the next heir male, and for See estate default of such heir male, then to remain. Vent. 230. says, that (P.) this was said per Hale Ch. J. to have been adjudged an estate tail. 43 Eliz. Burley's case.

9. Devise to *A.* for life, and after his decease to the use of the heirs of his body, is estate tail. Cart. 171. Hill. 18 and 19 Car. 2. Rundale v. Ely.

10. Devise to *A.* and to the issue of his body is estate tail, if *A.* has no issue at the time. But if he had issue at the time, then 'tis a joint devise, or if be after the death of *A.* * to the issue or children of *A.* then they take by way of remainder; per Hale Ch. J. Vent. 229. Mich. 24 Car. 2. B. R. in case of King v. Melling. * 6 Rep. 17. Wild's case. S. C. cited 10 Mod. 376. † [241]

11. Devise to *A.* for life, and after his decease to the issue of his body by a second wife, his first wife being then living, and for want of such issue, then to *B.* was adjudged in B. R. an estate for life only, per two justices against Hale Ch. J. but reversed in Cam. Scacc. 2 Lev. 58. Trin. 24 Car. 2. B. R. King v. Melling. Vent. 214. S. C. adjournatur. Ibid. 225 to 233. S. C. argued by the court, and

adjudged by two justices; contra Hale. But a note is added, that this judgment was reversed in the Exchequer Chamber.——Pollexf. 101. to 112. S. C. adjudged that it was an estate tail, and the first judgment reversed.——3 Keb. 42. pl. 15. S. C. 52. pl. 31. S. C. 95. pl. 42. S. C. adjudged, but judgment reversed, as the reporter says he heard.——S. C. cited by Raymond Ch. J. in delivering the opinion of the court. Gibb. 23. Pasch. 1 Geo. 2 B. R.——8 Mod. 384. S. C. cited per Raymond Ch. J. in S. C. and said, that he agreed that case to be established, but that there is no occasion to carry it one jot further, and that if Hale's opinion is truly reported in that case, he is clear of opinion if there had been a limitation over to the issues of the issue the devisee had taken only an estate for life, and the word issue had been a word of purchase.——But where the devise was to *A.* for life only, and after his decease to the issue of his body, it was adjudged that *A.* took only an estate for life; cited per cur. 8 Mod 263. as the case of Backhouse v. Wells in Chancery.

N. Ch. R. 12. A devise to such of the children of A. viz. B. C. and D. as shall be living at the death of E. is but estate for life to the children. 3 Ch. R. 86. 19 Jan. 1675. *Edwards v. Allen*: daughters B. C. and D. his heirs at law, and devised to B. C. and D. and such of their children as are or shall be living of the bodies of them, or either of them. The children living are only tenants in common for life, the reversion in fee being in B. C. and D. as coparceners. Fin. 214. Trin. 27 Car. 2. *Edwards v. Allen*.

13. If a man be tenant for life by a deed, and after he in reversion devises it to his heirs of his body; this being by several conveyances, the estate is not executed; for if a man is tenant for the life of B. remainder to the heirs of B. and tenant for life grants his estate to B. B. is not tenant in fee, but the estate to the heirs of B. is in remainder as it was before; per Holt Ch. J. Skin. 559. Mich. 6 W. & M. in B. R. In case of *Moor v. Parker*.

S. C. cited per Raymond Ch. J. 8 Mod. 260. in case of *Shaw v. Way*.
14. Devise to A. and if he die without issue, or to A. for life and if he die without issue, then to B. makes a great difference. 1 Salk. 236. pl. 181. Hill. 22 Ann. *Popham v. Bamfield* in Canc.

The issue of B. take only as persons described, and have only estate for life, though the words for want of such issue seem to imply an estate tail. But to make it so there must be a double use made of the word issue. First, It is a word of implication who were the persons to take. 2dly, As words of limitation to make an entail which is not to be admitted. Per Ld. Keeper. 2 Vern. 456. S. C.

16. A. bequeathed his personal estate to B. and C. and upon either of their dying without children, then to the survivor, and if both should die without children then to the children of the testator's other brothers and sisters. It was held by the Master of the Rolls that here the words (*dying without children*) must be taken to be children living at the death of the party. For that it could not be taken in other sense (viz.) whenever there should be a failure of issue, because the immediate limitation over was to the surviving devisee, and it was not probable that if either B. or C. should die leaving issue, the survivor should live so long as to see a failure of issue, which in notion of law, was such a limitation as might endure for ever, and therefore the testator must be understood of a dying without children living at the death of the parent, and consequently the devise over good. Wms's Rep. 534. Hill. 1718. *Hughes v. Sayer*.

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S. C. cited per Hale, Ch. J. Vent. 331.
17. Devise to A. for life, & non aliter, and to his sons, was adjudged an estate for life only in A. Arg. 8 Mod. 261. Trin. 10 Geo. cited in case of *Shaw v. Weigh*.

(Z. a) Estate in Fee, &c.

By other Words, without the Word Heirs, Sons,
Children, Issue.

1. **DEVISE** to *A. in perpetuum during his life* gives but estate for life, for the words (during his life) abridges the interest given before. Arg. Le. 283. cites 15 H. 7. 12.

2. Devisor recited that he was indebted to the tenant in 100l. *in consideration of the said sum to be released and discharged to his executor, he devised the said land to the said tenant; per the justices, those words and matter contained in the will is sufficient to give fee-simple.* And. 35. pl. 87. *Bryan v. Baldwin.* Bendl. 15, pl. 19. Anno 27 H. 8. Anon. but S. C. & S. P. held accordingly. — S. C. cited 2 And. 13.

3. A man leased his house and great demesnes, rendering rent, and then devised to J. S. *all his farm, the devisee shall have all the rent and the reversion also.* Arg. Ow. 89. cites * Pl. C. 194. Per Gawdy J. 2 Le. 43. says, it was so ruled. —

* This should be Pl. C. 195. b. 1 Eliz. in case of *Wrottesley v. Adams*, per A. Browne J. and Dyer Cp. J.

4. Devise of land *wholly to A.* is a fee-simple, per Coke Arg. 2 Le. 129. pl. 171. Mich. 29 Eliz. B. R. in *Hawkins's* case.

5. If a man devise land to one & *sanguini suo*, it is a fee-simple, but if it be *semini suo*, it is an estate tail. Co. Litt. 9. b. Contra per Doderidge J. Lat. 42.

6. If a man devise to A. and *his assigns*, without saying (*for ever*) the devisee has but estate for life. Co. Litt. 9. b.

7. The testator seised of a house in fee made a lease of it to W. for ninety-nine years, and in his will said, *I give and bequeath to A. and his assigns my house, &c. for ninety-nine years, and A. shall have my inheritance if the law will allow it.* A. has a fee simple. S. C. states it that "I give to Mo. 873. pl. 1218. Whitlock v. Harding. S. C. states it that "I

"A. all my lands of inheritance if the law will permit." Adjudged that A. had fee-simple, though there wanted the words (to her heirs) and the words go to the land and not to the estate in strict construction; but upon the whole matter it appears that the intent was to pass the inheritance; for an estate for life after ninety-nine years would be of little value and could not be intended. — Godb. 207. pl. 295. *Wedlock v. Harding.* S. C. states the devise to be by the words (all my inheritance if the law will) and adjudged per tot. Cur. that it passed a fee of the messuage and that all his other inheritances passed by the said will by those general words. — S. C. cited by Holt Ch. J. 1 Salk. 235. Hill. 1 Ann. B. R. and observes that the words are "his lands of inheritance." and that for the special intent of the testator is apparent from the words of the will. — S. C. cited by Holt Ch. J. 11 Mod. 104. and says that Hob. 2. is rightly reported, and wrong in Mo. that "lands of inheritance" is only a description of what lands shall pass. — S. C. cited 8 Mod. 255. Arg. in case of *Shaw v. Weigh.*

8. Devise to A. *in perpetuum* is a fee. But if it be limited [243] after death of A. to B. in fee, there A. has only estate for life. D. Cro. C. 129. cites S. C. 357. 2. pl. 44. Marg. cites 11 Jac. B. R. *Whitting's* case.

9. Devise to A. and his *successors* is a fee-simple without the word heirs; for it implies a fee-simple, though it wants' express words. Roll. R. 399. Per Coke. S. P.

and agreed words. Per Coke Ch. J. Mo. 853. in pl. 1164. Trin. 14 Jac. B. R.
J. in case of Webb v. Herring. — 3 Buls. 194. S. C. & S. P. agreed per Cur.

10. The *custom of a manor in ancient demesne* was that, if a tenant devised his land to another without other words expressing his intent that devisee should have a fee-simple; cited by Warburton J. as the opinion of Anderfon Ch. J. when he was Ch. J. of C. B. and now Hobart inclined to this opinion, and by Hutton and Winch he shall have fee by the custom, and accordingly it was adjudged. Win. 1. Pasch. 19 Jac. C. B. Anon.

11. *Coparcener in fee* devised all her part and purpart, without saying to him and his heirs; resolved that it was only an estate for life, because there was no clear intention that it should be more. Per Jones J. Lat. 136. Hill. 22 Jac.

S. P. in case of trustees without saying and to their heirs, 8 Mod. 259. per Cur. in case of Shaw v. Weigh.

12. Devise that *his executors grant a rent charge to A. in fee out of his said lands*; by that devise the executors have a fee simple in the land, otherwise they could not make such a grant. Arg. 4 Le. 158. in pl. 265.

13. Devise to A. for life, and then devises the *whole remainder* to B. It is a fee. Lutw. 764. Trin. 1 Jac. 2. Norton v. Ladd.

14. Devise of *fee-farm-rents*, a fee passes. 6 Mod. 110.. Per Holt Ch. J. in delivering the opinion of the court. Hill. 2 Ann. B. R.

Though the words of devise would otherwise give only an estate for life. 8 Mod. 259. in case of Shaw v. Weigh.

15. Where lands are *devised to a particular purpose and the death of the devisee may prevent that purpose*, there the devisee has fee. 6 Mod. 111. Per Holt Ch. J. in delivering the opinion of the court. Hill. 2 Ann. B. R. in case of Bridgewater (dutchess) v. Bolton (duke.)

16. In deeds, no other word will carry a fee-simple, but the word (heir) whereas in a will it is otherwise; for that *is a new conveyance by force of the statute of 32 H. 8.* which says that it shall be lawful for a man to *dispose of his lands by will, at his will and pleasure*; and this is a *reason why a devise to a man in perpetuum passes a fee simple* at the same time, that these words in a deed gave only an estate for life; per Holt Ch. J. Wms's Rep. 77. Pasch. 1705. in case of Idle v. Cook.

11 Mod. 102. S. C. adjudged that the words of the will give a fee, here being charge for ever, and a sufficient personal estate to purchase, &c. But he was not satisfied to fix it upon the land. He went upon the word hereditament to make a fee; the words lands and tenements carry only an estate for life, but hereditament carries the fee; for if he had not a fee then

17. A. seised in fee, devised *four coats to four boys, of the parish of D. for ever, and all his lands, tenements, and hereditaments, and all his personal estate to his wife and her assigns*, it was adjudged that the wife had a fee-simple, because she took the lands with a perpetual charge. 2 Salk. 685. Pasch. 4 Ann. B. R. Smith v. Tindal.

then it was not his hereditament, and when he gives his hereditament, he gives a descendable estate, otherwise it is no hereditament. Co. Litt. 6. These words cannot be satisfied, unless this word carry the inheritance. Hob. 2. is rightly reported, and wrong in Mo. 173. Lands of inheritance is only a description of what lands shall pass. — S. C. cited 8 Mod. 255. in case of Shaw v. Weigh.

18. *I dispose of all my worldly estate; first I will, that all my debts be paid and out of the remainder of my estate, I give my wife 300l. My will is, that my wife shall have one moiety of what is left after my debts paid; per Harcourt C. my worldly estate comprises all he had in the world. The whole estate is charged with debts and decreed a moiety of the surplus of the real and personal estate to the wife. 2 Vern. 690. pl. 615. Trin. 1715. Beachcroft v. Beachcroft.*

19. John Waller, a merchant, in 1683, married with Frances daughter of John Hillersden, clerk, and before marriage entered into articles with her father, int' al' to this effect; John Waller does for himself, his executors and administrators, covenant to and with the said John Hillersden, his executors and administrators, in consideration of the said intended marriage and 12000l. portion of Frances, that *in case the said John Waller should happen to die after the marriage before the said Frances, that he, the said John Waller, will leave her worth the sum of 1500l. immediately upon his death, or if the said Frances should then judge it more convenient to take the third part of all the estate both real and personal of the said John Waller she shall have liberty so to do.* The marriage took effect, and John Waller, died in 1726, without issue, having made his will and thereby gave several parts of his real estate to his wife for life and made her sole executrix and residuary legatee. He had but a small fortune at the time of his marriage; but acquired a considerable estate by trade and merchandize, viz. Estate in land of 1000l. per annum, and personal estate of about 1200l. after debts and legacies paid; the widow proved the will in the ecclesiastical court and soon after brought a bill in this court against defendant Fuller devisee of the real estate of her late husband, and against the heirs at law, to have the benefit of her election to have a third of the testator's real estate, and also to have the benefit of the lands devised to her by the will; as also the residuum of the personal estate. First point was, if she (the plaintiff) by making her election to take the third part of her husband's real and personal estate pursuant to the power given to her by the marriage articles, should have a third part of his lands in fee, or for life only.

Secondly, if by making the election to take the third part of his estate she must not waive the benefit of the will.

Talbot Solicitor General. Mr. Lutw. & al' pro quer' argued that the plaintiff was intitled to a third part of the testator's real estate in fee, and not for life only, that articles are to be construed like wills, that by a devise of his real estate a fee-simple pass without any words of limitation, so in articles no precise form of words is requisite; it is sufficient if the intent and meaning of the parties appear. In common acceptance all my real estate means all my interest in such estate and this was a reasonable agreement at the time

MS. Rep.
Mich. 2
Geo. in
Canc. Wal-
lerv. Fuller,

it was made; J. Waller had not an estate suitable to the plaintiff's portion, and since she run the risque of losing her fortune by putting it into his power absolutely without any certain provision secured to her, it is but reasonable she should have the benefit of the estate got by trade with her own money. Vide 1 Sid. 191.

[245] Secondly, as to the will, plaintiff was intitled to what was left her by the will as the gift of her husband, and as an addition to the provision made her by the articles; for being only estates for life, and money given by the will, that cannot be taken as a compensation, or satisfaction for the fee simple, which she claims by the articles, &c.

Contra, per the Attorney General, Mr. Mead, and Fazakerly, it was argued, that the plaintiff was intitled only to an estate for life in a third of the lands by virtue of the marriage-articles; there are no words of limitation of estate; therefore by the rules of law it was only an estate for life, that a provision for life was sufficient, and as much as usual in all marriage settlements and according to the common course and that articles are to be taken according to the common course of such sort of agreements, &c.

Secondly, If she is at liberty to make her election after she has proved the will, by which she takes much more than an equivalent for the 1500l. agreed to be left her by the articles, yet she cannot have both; if she elects the articles she waives the benefit of the will; for the devises by the will are inconsistent with the articles, both cannot stand together.

King C. was of opinion, that the plaintiff was intitled to a third part of the husband's lands in fee simple, and the meaning of the parties was, that whatsoever the husband should acquire the wife should have a third of it. Articles are a promise to do a thing, and must be construed according to the intention of the parties and the common acceptance of the words, and that by all my estate is commonly meant all my interest in it; as to the second point, the plaintiff cannot take the estates for life devised to her by the will, because that is inconsistent with the claim she makes to the inheritance of the third part by virtue of the articles; but as to the residuum of the personal estate that she may take by the will; for that claim is not inconsistent with the articles; and where the articles and will are not inconsistent, but both may stand, then she may claim and have the benefit of both, like the case of the custom of London, there children may take both by the custom and will, where the estate is sufficient to satisfy both the will and the custom; but a child in that case shall not take by the will, if by so doing the intention of the testator will be disappointed.

Decree. A third of the real estate in fee and residue of the personal to the plaintiff, partition of real estate to be made by commissioners. Per Cur.

Adjudged
that they
take a fee
by implica-

20. Where an estate is devised to trustees upon such trusts as cannot be supported without a fee; in such case a fee shall pass to the trustees, though the word heirs be not mentioned. Arg.

10 Mod.

10 Mod. 522. Mich. 10 Geo. 1. in Canc. In case of Acherly v. Vernon.

Mod. 8
Mod. 382.
Shaw v.
Weigh.

(A. b) Estate for Life in Tail, or in Fee; by Words first limiting a Fee, or Fee Tail, and then abridging it.

1. A. Has two sons and a daughter and devised lands to his wife for ten years after her decease, remainder to his youngest son and his heirs for ever, and *if any of his two sons * dye without issue of his body, &c.* then the land to remain to his daughter, and her heirs in fee; after in the life of the father, the younger son dies without issue; this is a good remainder to the daughter. D. 122. pl. 20. Mich. 2 & 3 P. & M. Anon.

Ibid. in
Marg. cited
it as adjudged
30 Eliz.
Fuller v.
Fuller. —
A feifed of
land in D.
and S. de-
vised it to

his wife for life, and after her death he devised the lands in D. to B. and his heirs for ever, and his lands in S. to C. and his heirs for ever. Item I will that the *survivor of them shall be heir to the other, if either of them die without issue.* This was held a devise of an immediate estate tail. Cro. J. 695. pl. 8. Mich. 22 Jac. B. R. Chaddock v. Cowley. — S. C. cited Sid. 148. in case of Col-linson v. Wright.

*[246]

2. W. C. by his will devised a messuage in these words, viz. *I give to A. L. my cousin the fee simple of my house, and after her decease to W. her son.* A. L. had an estate for life, and her son a fee-simple in remainder and so it was adjudged. And. 51. pl. 125. Pasch. 17 Eliz. Baker v. Raymond.

Bendl. 300.
302. pl.
293, adjudged
accord-
ingly. —
D. 357. pl.
44. S. C.
— And

says it was adjudged that the son had only a remainder for life and the wife the fee. so it is cited Mo. 362.

3. *The fee simple of his house to A. and after A's decease to B. son of A.* (which B. was devisors heir apparent). Adjudged that A. has but estate for life, remainder to B. for life, remainder in fee to first tenant for life. D. 357. 2. pl. 44. Pasch. 19 Eliz. Chick's case.

But And.
51. pl. 125.
Pasch. 17
Eliz. says it
was adjudged
that B.
had fee in

remainder and A. an estate for life only, Baker v. Raymond. S. C. — Bendl. 300. pl. 293. S. C. adjudged a fee in remainder in B. but that A. had only an estate for life. — S. C. cited 2 Bulst. 127. by Croke J. as adjudged an estate to A. for life, remainder to B. for life, remainder to A. in fee. — Mo. 362. cites S. C. accordingly.

4. If lands are devised to A. and his heirs, and if A. dies without heir of his body, that then the land shall remain over. The donee has only an estate tail to him and the heirs * males of his body. Cited by Mead, 3 Le. 130. pl. 183. Mich. 28 Eliz. C. B. as adjudged in the case of T Cary v. Glover.

* Quare if
the word
(males)
should not
have been
omitted.

5. If a man devise a house to his eldest son in tail, and another house to his second son in tail, and the third house to his third son in tail; and if any of them die without issue, the remainder to the other two equally; this shall be but for life, for this ensures to the quantity of the land, and not to the quality of the estate. 2

Brownl. 75. cited per Coke Ch. J. as adjudged 29 Eliz. Coke v. Petwicke.

6. A. devised to *B. and his heirs, and if B. die without issue, then the land to be sold*. B. has an estate in fee and not in tail; for A. disposed of no more of the estate by the last words than he did by the first. Bridgm. 3. per Walmley J. Arg. cites 40 Eliz. in B. R.

7. But otherwise if he had devised *that if B. died without issue the land should remain over*; for in this case he disposes of the land itself in remainder. Bridgm. 3 Arg. by Walmley J. cites 40 Eliz. B. R. to which Owen agreed.

D. 357.
Marg. pl.
44 cites
S. C. that

B. has only an estate for life. — So to A. for ever *habend. for life* is but an estate for life; per Crew Ch. J. Lat. 43. 44. Trin. 2 Car. said it had been adjudged.

8. Devise to *B. for ever, and after his decease remainder to his heir male for ever*, this is an estate tail. Bulst. 219. Trin. 10 Jac. B. R. Whiting v. Wilkins.

10. Devise to his son and his heirs after the death of his wife, *and if his daughters over-live his wife and his son, then the daughters shall have it for life*, and after their death to B. and C. they paying annually, &c. Resolved, 1st. That the wife had estate for life. 2dly, That the son had fee tail. 3dly, That B. and C. had fee, by reason of the annual payment. Mo. 852. pl. 1164. Trin. 14 Jac. B. R. Winterbury's case.

Per Doderidge J.
Roll. Rep.
320. cites
D. 357.
Ibid. the
reporter
says, Note
it is no reason
that B's failure
should give
him a greater
estate in
equity, than
the will in

11. A. devised *the fee of his land to B. his wife, remainder to C. for life, remainder to D. for life*. B. has estate for life, and remainder expectant, and her baron shall not be tenant by the curtesy; per Crew Ch. J. Lat. 43. 44. Trin. 2 Car.

12. A. had B. his son, and M. his daughter, and devised land *to M. and her heirs*, and his will is, *that if B. pay M. 50l. then B. should have the land*; the money was not paid at the day appointed. Finch C. took this but in nature of a security, though objected that it was a contingent devise to B. on payment, and then too if he had paid he could have had but an estate for life, the remainder or reversion in fee to the daughter. 2 Chan. Cases. 1. Hill. 30 & 31 Car. 2. Bland v. Middleton.

writing gives him on performance of the condition, by the express words of the will in writing, and the will cannot be of laid but in writing. So that if A. had made such will in writing, and then had *declared by parol* that the son should have the fee simple on payment it would not give it him, yet it was decreed ut supra. Quære si bene. — But 2 Wins's Rep. 176. Trin. 1723, it was said by Ld. C. Macclesfield, that in all cases where there is a measuring cast (as he termed it) between an executor and an heir, the latter shall in equity have the preference. [And why may it not be the same between an heir and a devisee?]

13. One gave lands to *A. and his heirs, and if A. die without heirs of his body, that his sister should have 600l.* Adjudged an estate in fee. Skin. 19. Arg. cites Mich. 30 Car. 2. B. R. Cane v. James.

B. takes by
way of *cross
remainders*.
Raym. 452.
S. C. —
2 Show.
136. pl.

14. Devise of lands to his two daughters A. and B. *and their heirs equally to be divided, &c. and if they die without issue, then I give all my said lands to my nephew C. and the heir male of his body*, with divers remainders over; A. dies; B. shall hold to her and the heirs of her body all the lands by way of remainder by implication, and

and nothing passes to C. on the death of A. Jo. 172. Mich. 33 115. S. C. Car. 2. B. R. Holms v. Meynel. — adjudged. — Skinna.

17. pl. 19. S. C. adjudged.

15. A man seised of lands in fee had issue a son by the first venter, and two sons by a second venter, and devised his lands to his eldest son and his heirs, and if he die without heir, to his two other sons; the eldest son died without issue; and if this was an estate tail, or a fee-simple, was the question upon a special verdict found; and it was adjudged an estate tail, but it was not argued or defended by the other side; ideo quære. Skin. 269. Hill. 2 & 3 Jac. 2. B. R. Blackstone and Stone.

16. If a man devises all his lands to Henry the eldest son of his brother Thomas, and his heirs if he live till 21, and if he dies before 21, then to the next son of Thomas, and if Thomas have no issue, then to the first son of his brother William and his heirs; by this devise if Henry dies before 21, his next brother takes but an estate for life, ut videtur. Skin. 562. pl. 10. Mich. 6 W. & M. in B. R. Bevison v. Husley.

17. Devise by the father to B. his second son after the death of his wife, and to his heirs for ever, and for want of such heirs, then to the right heirs of the father, is estate tail in B. 1 Salk, 233. Trin. W. 3. B. R. Nottingham v. Jennings.

S. C. adjudged accordingly. — Comyns's Rep. 82. pl. 51. S. C. adjudged. Wms's Rep. 23. S. C. adjudged per tot Cur. — Ld. Raym. Rep. 568.

18. But if the devise had been over to a stranger it had been void, and B. had taken a fee. Ibid. [248]

25. S. C. & S. P. by Holt Ch. J. — Ld. Raym. Rep. 568. S. C. & S. P. by Holt Ch. J. Wms's Rep.

19. A. the father having issue a son and two daughters deviseth the estate in question to his son and his heirs; provided nevertheless, that if the son should die before he comes to the age of 21, or without issue of his body, then it should go to the daughters; the father dies, and the son lives to the age of 21. The court inclined against the plaintiff, viz. that the son had but an estate tail; and so the devise to the daughters took effect, the son being dead without issue; for though it is devised to him and his heirs, yet the latter words if he die without issue, make it an estate tail; for his meaning seems to be plain, that if the son had issue, that issue should have it, if not, it should go to the daughters. Freem. Rep. 509, 510. Mich. 1699. in B. R. Heliér v. Jennings. 12 Mod. 276. Hilliard v. Jennings. S. C. the son lived till after 21, and devised the land. It was insisted that the son had all the fee in him, and that the word (Or) shall be construed (And) and cited Cro. E. 525. But per Holt Ch. J. there is no occasion to construe (Or) as (And;) for it might be the father's design to hinder him from marrying till 21; and as for the case of Cro. El. that was adjudged an estate tail; but to this point the court gave no opinion; and after Holt denied that case to be law. — Carth. 514. S. C. but S. P. does not appear. — Ld. Raym. 505. S. C. & S. P. accordingly.

20. A special verdict finds, that the grand-father was seised in fee, and by will devises thus, I give to my daughter A. for life, remainder to A. L. and his heirs; and for default of such heirs remainder over. And the question was, if this be an estate in fee or in tail. Holt Ch. J. said, you will find it a hard point to find this an estate

estate tail. Sir Peter King urged, that it was so; and cited the case of Idle and Cooke Easter Term. 4 Ann. If the remainder had been to his brother, or to any body that had been heir at law, it would have been a tail; for then he could not have died without an heir, and so a remainder might properly be; or if it had been *De fe exeunte*, or the like; but these limitations were never carried further. But the court gave judgment that this was a fee, but made the rule, *Nisi*, &c. Note, the controversy was between the heir of the devisor, and the heir of devisee, who was no way related to the devisor. 11 Mod. 207, 208. pl. 10. Hill. 7 Ann. in *B. R. Grumble v. Jones*.

21. I give and devise my lands, &c. in B. unto my three daughters M. S. and A. to be equally divided between them, to hold to them their heirs and assigns for ever. And if it shall please God that all my three daughters shall happen to die, and leave no issue of their bodies to inherit such estate as in this my will is before devised to them, or not be of age, or make no other disposal thereof, that then the said lands should be vested, and be sole and proper estates of my kinsman S. B. and I do hereby give, devise and bequeath the same to the said S. B. and his heirs and assigns for ever accordingly, provided always that the said S. B. shall pay unto every one of all my sister's children, that shall be then in being at the time of such my estate falling to him by failure of my issue the sums of 100l. to each and every of them. A. the youngest daughter died in her infancy, in the life-time of W. the father; S. the second daughter survived her father and mother; and many years after she came of age, by her will made a disposal of her interest in the said premises, by the name of all her messuages, lands, tenements and hereditaments; and M. (now M. M. the defendant) is now living and married, and has several children. This case being sent to the judges, they made the following certificate. "We have heard counsel on both sides upon the case, and are of opinion that the said S. and M. two of the daughters of the said W. S. by virtue of the said will, and by the death of the said A. their younger sister, in the life time of the testator, took an estate in fee-simple, in their respective shares of the said real estates." His lordship was of the same opinion with the judges, and was pleased to decree accordingly, *Barnard. Chan. Rep. 7, 8, 9. Pasch. 1740. Miller v. Moor,*

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(A. b. 2) Estate Tail.

Where the Limitation is abridged or enlarged by Words Subsequent.

1. ONE by will devises all his lands to B. and his heirs of his body begotten, and afterwards by the same will devises that if B. dies the same lands shall remain to C. in fee; the court held that B. had estate tail by the first words, and not an estate for life by the last words. And. 33. pl. 84. Hill. 14 Eliz. Anon.

2. If

2. If lands be devised to *one and his heirs*; and if he die without heirs of his body, that the land shall remain over, that he had no greater estate than to him and his special heirs, viz. heirs males; and the reason was, because the will took effect by the first words. Godb. 16. pl. 23. cited by Mead as adjudged Pasch. 25 Eliz. in C. B. in case of Glover v. Tracey.

3. Devise to *A. his son, and the heirs of his body*, and adds further, viz. *I will that after the decease of A. my land shall remain to B. son of A.* Adjudged A. had estate tail, and his wife entitled to dower. Mo. 593. pl. 801. Hill. 35 Eliz. Atkins's case.

Cro. E. 148. S. C. is, that after the decease of A. it shall remain to B.

the eldest son of A. and to the heirs of his body, the remainder over to three other sons in the same manner; it was adjudged an estate tail in A. — And. 33. pl. 84. Anon. Hill. 14. Eliz. S. P. held accordingly. — Bendl. 207. pl. 244. S. P. and seems to be S. C. held accordingly.

4. A. devised land to *B. his eldest son, and the heirs of his body after the death of his wife, and if B. died living the wife, then to C. his younger son*, and devised other lands to another son and the heirs of his body, and if he died without issue, then to remain, &c. *B. died living the wife.* It was strongly urged, that his estate should cease, for it being said if he died living the wife, this was corrective of what went before. But per tot. Cur. it was an absolute estate tail in B. as if the words had been, if he died without issue living the wife; for he could not be thought to intend to prefer a younger son before the issue of his eldest; per Hale Ch. J. Vent 230. cites Cro. C. 185. [Pasch. 6 Car. B. R.] Spalding v. Spalding

S. C. cited 3 Lev. 434. — S. C. cited by Ld. C. Parker. Wms's Rep. 427. in case of Hewet v. Ireland. And 2 Wms's Rep. 196. in case of Newland v. Shepherd. Mich. 1723. — S. C.

cited per Holt Ch. J. in delivering the opinion of the court. Ld. Raym. Rep. 514. Hill. 18 W. 3. in case of Badger v. Loyd.

5. Devise was to *B. his son and heir, and if he die before 21, and without issue of his body then living, the remainder over, &c. B. survived the 21 years*, and then he sold the lands, and died: it was held, that he had a fee simple immediately, and by consequence the sale was good; for the estate tail was limited to arise upon a contingency subsequent. 1 Sid. 148. pl. 9. Trin. 15 Car. 2. B. R. Collinson v. Wright.

6. Upon a special verdict the case was; R. G. seised in fee of lands in S. by will in writing devises to *R. son of his late brother, all his lands commonly called P. and also all other his lands during his natural life, and to his heirs male of his body begotten; and for want of such issue, he the said R. to have the said estate but during his natural life, and no longer; and then his will was, that the aforesaid estate should descend to P. his nephew*; R. suffers a common recovery to the use of himself and his heirs, and devises this land to the defendant in fee, and dies without issue male; and it was adjudged to be an estate tail in R. and so the remainder barred by the recovery, and not an estate for life, and so forfeited by the recovery; for the words, and for want of such issue, he the said R. to have but an estate during his natural life, is no more than the law implies; for if tenant in tail has no issue, it resolves into an estate for life, and so it was adjudged; the objection was, that it should be construed thus,

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thus, viz. I give the land to A. during his life, and no longer, in case he has no issue male of his body; and so an estate tail upon a contingent; and he dying without issue male, it is now become but an estate for life ab initio, but the judgment was ut supra. 2 New. Abr. 59, 60. cites it as adjudged Hill. 29 and 30 Car. 2. Rot. 1247. *Fountain v. Gooch*.

7. Devise to father for life, remainder to the first son, &c. Remainder to trustees for 99 years to support the remainders, it is a good term to support the remainders, notwithstanding the same is limited and inserted after the limitation to the first son (it being in the case of a will.) 2 Chan. Rep. 171. 31 Car. 2. in case of *Green v. Rooke*.

S. C. and
S. P. held
according-
ly. Wms's
Rep. 54, 55.
Hill. 1702.
per Ld.
Wright,
Malt, Trevor, Master of the Rolls, and Powell J.

8. A recital in a codicil cannot amount to a devise, as mentioning in the codicil that he had given an estate tail to B. whereas the estate he gave to B. by the express words was but an estate for life to B. and the tail to his son. This will not enlarge B's estate for life to an estate tail. 2 Vern. 449. 451. in case of *Bampfild v. Popham*. Mich. 1703. Arg.

Ibid. 58. S. C. and S. P. resolved.

• (B. b) Estate for Life in Tail or Fee.

By Words first limiting Estate for Life.

Dal. 50. pl.
15. S. C. in
entidem
verbis.

1. A Man made his will in this manner: Item, I give my manor of D. to my second son. Item, I give my manor of S. to my said son and to his heirs. It was resolved by three justices, that in the first he had but an estate for life, and the item seems to be a new gift to a greater preferment in the second place for the amendment of the other. But Brown contra, and that (item) is as a copulative, and that (the heirs) expressed in the last clause extend to both the lands; but if those words had been put in the gift of the first lands it would be otherwise. And Dyer said, that if in the first clause no person had been named, but that the words had been, Item, I give the manor of D. Item, I give the manor of S. to J. K. and his heirs, in such case this should have referred to both the manors. Mo. 52. pl. 153. Pasch. 5 Eliz. Anon.

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2. A. grandfather, B. father, and C. was the son; A. devised to B. for life, remainder to C. and his heirs males of his body, remainder to the right heirs of A. and the heirs males of his body; then A. dies, and afterwards B. dies, then C. dies without issue male, leaving M. a daughter. It was argued, that M. had a fee simple; for immediately on the death of A. the remainder vested in B. and vested in him as a fee simple, and cannot by matter subsequent be converted into an estate tail, and so it was adjudged. Cro. E. 96. pl. 12. Pasch. 30 Eliz. B. R. *Smith v. Hawes*.

Mo. 593. pl.
803. S. C.

3. A. devised lands to R. his daughter for life, and if she marry after my death, and have heir of her body, then I will that the heir after

after my daughter's death shall have the land, and to the heirs of their bodies begotten; and if my daughter die without issue of her body begotten, then P. T. shall have it to him and his heirs. F. died; R. married J. D. and had issue. It was agreed by all the justices, that a devise to one and the heir of his body is an estate tail, and shall go to all the heirs of his body; for that the word heir is nomen collectivum. But in the principal case Gawdy and Fenner held, that she had only an estate for life; but Popham e contra; sed adjournatur. Cro. E. 313. pl. 5. Hill. 36 Eliz. B. R. Clerke v. Day.

4. Devise to A. for life, and afterwards to the next heirs male of A. and to the heirs of the body of such next heir male. Agreed per tot. Cur. that A. had only an estate for life. 1 Rep. 66. b. Mich. 39 & 40 Eliz. C. B. Archer's case, alias, Baldwyn v. Smith. ^{2 And. 37. pl. 24. S. C. adjudged, but S. P. does not so fully appear.} Cro. E. 453. pl. 20. S. C. adjudged. S. C. cited by Hale Ch. J. Vent. 216. Ibid. 225. S. C. cited Arg. Ibid. 232. S. C. cited by Hale Ch. J. Gibb. 24. Pasch. 1 Geo. 2. B. R. the S. C. cited by Raymond Ch. J. in delivering the opinion of the court. S. C. cited per cur. 2 Vern. 325. Le. 257. per Jeffry J. in case of Manning v. Andrews S. P.

5. Devise to his son T. and the heirs males of his body for 500 years provided if he or any of his issue male alien the premises, then to T. S. and his heirs; adjudged an estate tail, and the devise for 500 years is void, because the testator intended it to be an inheritance, for by the proviso he took care to advance the issue of T. whereas if this should be a term for years, then by the descent of the inheritance on T. it would be merged, which never was the intent of the devisor. Mo. 772. pl. 1067. Trin. 2 Jac. C. B. Lovice v. Goddard. ^{10 Rep. 78. a. 87. a. S. C. Pasch. 11 Jac. in error brought in B. R. Ld. Ch. J. Coke held the devise to T. was only for a term of years,}

and with this Wish J. accorded. Cro. J. 61. pl. 7. C. B. Anderson and Warburton held the words (for 500 years) to be void; but Daniel and Walmesley e contra, that they should not be merely void, but should be construed, that the estate shall be determined when the 500 years are expired, viz. that they shall be tenants in tail for 500 years, and if it should be construed a term only, it would be extinguished by descent of the inheritance. Mod. 115. in pl. 14. Pasch. 26. Car. 2. Ld. Keeper Finch denied my Ld. Coke's opinion in Leonard Lovell's case, which saith that in case of a lease settled to one and the heirs males of his body, when he dies the estate is determined; for he said it shall go to his executors. Sel. cases in Chan. 30. S. C. of Lovell's cited by Ld. C. Nottingham, and says that Ld. Coke's error in that case is in saying, that if a term be devised to one and the heirs males of his body, it shall go to him or his executors no longer than he has heirs males of his body; but Ld. Nottingham says, that it was resolved otherwise in case of LEVENTHORP v. ASHBY, 11 Car. B. R. Roll's abridgment tit. Devise, fol. 611. (L.) pl. 1. For these words are not the limitation of the time, but an absolute disposition of the term.

6. A. devised to his wife for life, remainder to B. and if he have issue male of his body, then to such issue, and if no issue male, then to C. and so to D. It was adjudged that the words (if no issue male) gave every one an estate tail. 9 Rep. 127. b. Hill. 8 Jac. In the court of Wards, Sondag's case. ^{Per Trevor Ch. J. This devise to B. generally (expressing no estate) and if A.}

should have no issue male, remainder over, was for that reason rightly adjudged an estate tail. Wms's Rep. 57. in case of Bampfild v. Popham.

7. A. seised of Black-acre and White-acre in fee, devises both to his wife for life, the remainder in Black-acre to B. in fee. Item, I make my wife executrix of all my goods and lands. The court held that the fee of White-acre is not given here to the wife; for (lands)

(lands) shall intend such lands as she may have as executrix; but by Popham otherwise it had been, if he had said I make my wife *heir of all my lands.* Noy. 48. Clements v. Caffye.

8. A copyholder surrendered to the use of his will, and devised *to his first son for life*, and after his decease *to the heir male of his body, &c.* This was ruled to be an estate tail; and this differs from Archer's case in 1 Rep. for that the devise there was for life, and after to the heir male, and the heirs of the body of that heir male; there words of limitation being grafted upon the word heir, it shews that the word heir was used as *designatio personæ*, and not for the limitation of the estate. Per Hale Ch. J. Vent. 232. cites 1651. Hanley v. Lowther.

Raym. 28.
Plunket v.
Holmes. S. C.
C. adjudged
per tot. Cur.
accordingly.
Nisi, &c.
—Sid.

47. pl. 6.
S. C. resolved.
—

Keb. 29. pl.
83. Plunket
v. Holmes.
S. C. adjor-
natur. —

Ibid. 119.
pl. 29. S. C.
adjudged accordingly.

9. A. seized in fee, *devised his land to T. his eldest son for life*, and *if he dies without issue living at the time of his death, then to L. another son and his heirs for ever.* T. suffered a common recovery, and died without issue. Resolved that T. has only an estate for life, the remainder to his heir not executed; and though the reversion descended on him as heir of A. yet it shall not drown the estate for life against the express devise and intention of the will, but shall leave an opening (as they termed it) for the interposition of the remainders when they shall happen to interpose between the estate for life and the fee; and that this being a contingent remainder, and not an executory devise, was barred by the recovery suffered by B. 1 Lev. 11. Hill. 12 & 13 Car. 2. B. R. Holmes v. Plunket.

Mo. 593.

Clerk v.
Day. S. P.

—Cro. E.
313. S. C.

—S. P.
by Hale

Ch. J. Trin. 24 Car. 2. B. R. Vent. 215.

10. Devise to *A. for life*, remainder to his heir, is a fee simple; for heirs is nomen collectivum. But if he adds, *and to his heirs of such heir*, it is for life only; for words of limitation being added to the word heir, it shall be taken as *designatio personæ*. 3 Salk. 126. pl. 1.

11. Devise to A. and his heirs in trust for B. *for life*, and after his decease *to the heirs male of the body of B. now living*, and to such other heirs male and female as B. shall have after of his body, remainder over, B. had at the time of the will a son named C. B. had only an estate for life, and the remainder was vested in C. on the death of deviser, and was not in contingency, and the words (heirs males of the body of B. now living, &c.) was a *description* of C. Adjudged in B. R. but reversed in Cam. Scacc. but that reversed in Dom. Proc. 2 Jo. 99. Mich. 29 Car. 2. B. R. James v. Richardson.

12. Devise was to *W. T. for life*, and to his heirs; and for want of heirs to him, then to *G. T. in like manner*; and for want of heirs of him, then to *W. F. and his heirs for ever*; the two first devisees died without issue. Adjudged they had an estate tail, because these words, (for want of heirs of him) must be intended heirs of their bodies, especially because *W. F. was next heir at law to them*, and therefore they could not die without heirs so long as he or any of his

his heirs were living. 3 Lev. 70. Trin. 34 Car. 2. C. B. Parker v. Thacker.

13. Devise to A. for life, and if he have issue male, then to such issue male and his heirs, and if he dies without issue male, to B. and his heirs. A. had but estate for life, and both remainders are contingent. 1 Salk. 224. Mich. 6 W. & M. in C. B. Lodding-ton v. Kime. 3 Lev. 431. S. C. & S. P. resolved accordingly, but 435 says, that the case was

twice argued upon this point, whether it was a contingent remainder or an executory devise; and that afterwards, before any judgment given, the parties agreed and divided the estate. S. C. Ld. Raymond Rep. 203. Luddington v. Kime, and resolved per tot. Cur. that A. had only an estate for life. S. C. cited 8. Mod. 256. 259. Arg. Raymond Ch. J. in delivering the opinion of the court in the case of Shaw v. Weigh says, that this case in 3 Lev. 431. is not well reported, and that he heard it argued seriatim, and that the case was adjudged that A. took an estate for life, and the point remained unshaken in Chancery and in the House of Lords, so that *this* there was adjudged a good word of purchase though an estate for life was given to the father of the issue. 8 Mod. 383. in case of Shaw v. Weigh. Gibb. 21. S. C. cited by Raymond Ch. J. accordingly; and said, that it had also had decisions in other places; it having been brought into Chancery, and by appeal thence into the House of Lords, yet judgment given in C. B. was in all those places confirmed, and has been acquiesced in ever since; and thence infers that the word issue is properly a word of purchase when the intent of the party is apparent. S. C. cited per Cur. by the name of Bullington v. Barnardiston. 2 Vern. 450. Mich. 1703. S. C. cited by Parker Ch. J. 10 Mod. 403. to be wrong reported in Lev.

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14. Devise of lands to trustees and their heirs for A. for life, and to his first, &c. sons in tail, but if A. die without an heir male of his body begotten, remainder over. A. is only tenant for life; for the words could not enlarge an express estate devised to him for life. 2 Vern. R. 427. pl. 388. Hill. 1701. Bamfield v. Popham. Ibid. 449. S. C. and same judgment Mich. 1793. per Wright. K. Holt and

Trevor Ch. J. and Powell J. and by them it is a fixed rule in law, that an express estate for life cannot be enlarged by an implication but by express words it may. As in the common case, if an estate be given to J. S. for life, and after his decease to the heirs of his body, that by express words enlarges his estate and makes him tenant in tail; but though the words in the principal case are sufficient to create an estate tail, yet it is only by implication, and when an express estate for life is not before limited. Even in a will, an implication shall not alter an express estate, but where there is a subsequent devise in express words to the same person to whom an estate for life was before devised, that will enlarge the estate. Wms's Rep. 54. S. C. decreed accordingly. 2 Freem. Rep. 266. pl. 335. S. C. argued; Sed adjournatur. But ibid. 269. pl. 338. S. C. agreed by all that A. had only an estate for life. S. C. 1 Salk. 236. pl. 14. Hill. 2 Ann. in Canc. says, that by a codicil annexed he recited, *Whereas he had given an estate tail to A. &c.* And it was objected, that by the codicil the intent of the deviser appeared, and that by the will A. had an estate tail; for he might have posthumous children, and more than ten sons; sed non allocatur; for where a particular estate is expressly devised, we will not by any subsequent clause collect a contrary intent inconsistent with the first by implication; and therefore they construed dying without issue male, a dying without such issue male. And they said, there was a mighty difference between a devise to A. and if he die without issue then to B. and a devise to A. for life, and if he die without issue, then to B. Adjudged per Wright Ld. Keeper, Holt Ch. J. and Trevor Ch. J. S. C. cited 2 Vern. 546. 8 Mod. 260. Raymond Ch. J. said, that true it is, it has been held that where an express estate for life is devised, in such case no subsequent words shall create an estate tail by implication, but this is an old, antiquated and exploded opinion, and contrary to the later authorities; and in this case the subsequent words, viz. Without committing waste, do not controul a devise. It is true, where an estate for life is devised to one, with a provision immediately for all his sons successively, and if he die without issue, remainder over, in such case the devisee hath but an estate for life, because these words, if he die without issue, shall be intended a dying without such issue as are expressed in the will; and upon this distinction the case of Popham and Bamfield was adjudged; for there is a great difference between a devise to J. S. for life, and if he die without issue, remainder over, and a devise to J. S. (without expressing for what estate,) and if he dies without issue remainder over.

15. Devise to trustees and their heirs on trust to permit A. to take the profits for his life, and afterwards to stand seised to the use of the heirs of A's body, is a use in A. and he has an estate tail. 2 Salk. 679. pl. 6. Hill. 1 Ann. B. R. Broughton v. Langley.

S. C. cited Wms's Rep. 59. in a note at the end of the page. —

S. C. cited 8 Mod. 258. Arg. & ibid. 384. by Raymond Ch. J. in the case of Shaw v. Weigh, and makes the same obser-

vation as to the excluding the after-sons, and to avoid that by making it an estate tail by implication in the father, because an after-son could not take as a purchaser, but he said, that in D. 171. * it is said that an implication shall never ride over an express limitation; so that an estate devised to A. for life, and after to his first son and the heirs of the body of such first son, and if A. die without issue, then the remainder over, in that case A. shall not have an estate by implication, because there is an express limitation in tail to the first son. 8 Mod. 314. Pasch. 1 Geo. 2. in S. C. — Gibb. 14. Arg. cites S. C. & ibid. 26. S. C. cited by Raym. Ch. J. accordingly, and said that the case of Sutton v. Paman stands upon the same reason.

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Upon a reference for the opinion of the judges of C. B. it was by three certified as an estate tail, but

16. A devise was to *B. for life, without waste, with power to make a jointure, remainder to his first, and so to his sixth son* (but no farther) and then followed these words, *if B. should die without issue male of his body, then to C. in fee*. It was resolved by all the judges of C. B. upon a reference out of Chancery, that there being no limitation beyond the sixth son, and for that there might be a seventh who was not intended to be excluded, therefore to let in the seventh and subsequent sons to take (but still to take as issue and heirs of the body of B. in tail, by descent and not by purchase) the court held the words (*if B. should die without issue male of his body*) did in a will make an estate tail. Wms's Rep. 759. Arg. says, this was solemnly adjudged in *Ld. Trevor's* time (*May 1707.*) *Langley v. Baldwin*.

17. Devise to *W. L. for life*, he paying 200l. a-piece to his two sisters, and after his decease to the heirs male of the body of A. and the heirs male of the body of every such heir male severally and successively, as they shall be in priority of birth and seniority of age, remainder to B. Whether A. is tenant for life only or in tail? 2 Vern. R. 551. pl. 501. Pasch. 1706. *Legatt v. Sewell, & Ux'. and Weller*.

Tracy J. held it only an estate for life; but the court appearing afterwards not to be satisfied with the certificate of the three judges, directed an ejectment to be brought in B. R. in order to have the matter settled; but it is said that the parties agreed, and so the question was not determined. Wms's Rep. 83. 92. Pasch. 1706. *Legate v. Sewell*. — Ab. Equ. 394, 395. pl. 7. S. C. and adds a note, that all the judges certified their opinion, that *W. L.* had but estate for life. — Cases in Equ. in *Ld. Talbot's* time, 8 Arg. cites S. C. and says the judges were divided. — Upon a case per *Cowper C.* to the C. B. *Trevor Ch. J.* *Blencow* and *Dormer* were of opinion in 1706. that the nephew had an estate tail vested in him; but *Tracy contra*, and that he had only an estate for life, and that the words (heirs males of his body) are words of purchase, and the intent of the devise seems apparently so to be by limiting the estate expressly to *W. L.* for life, and by limitation over of the estate to the heirs males, &c. which words must be rejected as idle and void, if the former words are words of limitation, and this is warranted by 3 Cro. 313. *Clerk v. Day*, and 1 Rep. *Archer's* case. For the reason of *Archer's* case is not because the devise was to the heir male of the tenant for life in the singular number, for if it had gone no farther, it would have been an estate tail executed, because the word (heir) is nomen collectivum, and the same with the word (heirs) 1 R. Ab. 626. and 3 Cro. that it was because the estate was limited over to the heirs males of the body of such heir male; so was *Pawsey* and *Lowdall*, and cited by *Ch. J. Hale*, Vent. 232. and these reasons are an authority in point; this was a reason of *Archer's* case why the heir male took by purchase. In *Lisle and Gray's* case 2 Jon. 114. 2 Lev. 223. where the limitations were as here held not to be an estate tail executed in the father, who had an estate for life limited to him, and the court went upon the same reasons (among others) and yet that was upon a construction of a conveyance, where generally the words shall be taken according to their legal sense, and their operation in law shall controul the intent and meaning of the party, but this is in the case of a will where the intent of the party shall controul the legal sense and meaning of the words; and as to the case of *Lisle and Gray* the judgment of B. R. was affirmed in *Cam. Scacc.* But notwithstanding the opinion of the three judges, *Cowper* Chancellor would not give his judgment, and declared he was not satisfied, and directed a trial in C. B. &c. but the matter was agreed afterwards. MS. Rep. S. C. — N. B. The Chancellor, though he now doubted, had given his opinion under a counsel, that *W.*

had

* 18. A. seised in fee, devised lands to B. *to hold to him for the term of his natural life only, without impeachment of waste, and from and after his decease to the issue male of his body* (if God bless him with issue) *and to the heir male of such issue male; and for want of such issue,* testator limited two remainders over in the same words. It was adjudged that B. took but an estate for life, the estate being given him for life only, and there was a limitation afterwards to the heirs male of his issue, which was a *description of the person who was to take the estate tail.* 2 Wms's Rep. 476. Arg. cites it as determined. Hill. 12 Ann. B. R. in Ld. Parker's time. *Backhouse v. Wells.*

Devise to A.
for life only,
without im-
peachment of
waste, and
if he died
leaving issue,
then to such
issue and the
heirs of such
issue, cited
as adjudged
an estate for
life only.

8 Mod. Arg.

261. cites 9 Ann. Backhouse v. Wells. — 10 Mod. 181. Mich. 12 Ann. B. R. the S. C. adjudged an estate for life only, remainder to the issue in tail, and Parker Ch. J. who delivered the opinion of the court, said, that the words of the will were so exprets to this purpose, that neither any words that could have been used, or any arguments could make it plainer, and that this was the obvious and legal import of these words, and what they would have imported in a conveyance. — S. C. cited Arg. Gibb. 12. & ibid 22. Per Raymond Ch. J. in delivering the opinion of the court, 1 Paich. 1 Geo. 2. B. R. in the case of Shaw v. Weigh, as adjudged only an estate for life, and that the issue took by purchase, and says, that there (issue male) was a description of the person that was to take the estate tail. — S. C. cited by Raymond Ch. J. 8 Mod. 383. — Fortescue's Rep. 133. to 140. S. C. adjudged to be an estate for life; and Parker Ch. J. who gave the * resolution of the court said, that stronger words could not be invented to make the issue in tail take as a purchaser, than the words in this case. — Ibid. 65. S. C. cited Arg. and Ibid. 75. S. C. cited by Raymond Ch. J. and ibid. 76. 81. & 87.

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19. A limitation in a will to one *to take and enjoy the profits of an estate during his life, and after his decease to the heir male of his body*, would make an estate tail, where nothing appears that explains the testator's intent to the contrary, otherwise not. Comyns's Rep. 28q. Mich. 5 Geo. 1. C. B. White v. Collins.

20. A. devised a term to B. his son during his minority, and if he attained 21, then to him for his natural life and no longer, remainder to such of his issue to be begotten as he the said B. should devise the same unto, and if he should die without issue, then he devised the residue of the term to his brother J. N. This was held per Parker C. to be only an estate for life in A. with a power of disposing it to which of his issue he thinks fit, the words (no longer) plainly shewing this to have been the intention of the testator. 10 Mod. 402. Pasch. 4 Geo. 1. in Canc. Target v. Grant.

Gilb. Equ.
Rep. 149.
S. C. de-
creed that
the devise
was good.
—— S. C.
cited Arg.
Gibb. 317.
to be held
good.

21. A. by will devised his estate to *trustees and their heirs, &c. in trust, to convey to B. without waste, remainder to trustees during his life to preserve contingent remainders, remainder to his first, &c. son in tail male, remainder to daughters in tail general as tenants in common, with power to B. to make a jointure not exceeding a moiety; and if B. die without issue, then he devised the same over.* It was objected, that this was an estate tail in B. and the rather, for that otherwise the daughters of the son of B. could never take, which would be against the testator's intention. It was answered, that here was an express estate for life to B. and the words (if B. die without issue) being only words of implication, would not merge or destroy an express estate for life according to the case of

Barnfield v. Popham. But Ld. C. Parker exploded the notion that words of implication should not turn an express estate for life into an estate tail, and said, that if I devise an estate to A. for life, and after his death without issue then to B. this will give an estate to A. according * to Sondag's case, 9 Rep. 227. b. But here being a limitation to B's son upon his death and after to his daughters, the following words (*if B. die without issue*) must be intended, if he should die without such issue; and that as to what was urged that unless the words should create an estate tail in B. his son's daughters could not take, his lordship said, that it did not appear that A. intended that he should take, for he might think, that on B's dying without issue male, his name and family would be determined, for which reason he might limit it over to the daughters of B. himself; besides, that B. would be tenant in tail, and when of age might by docking the entail give the premises to his daughters. Wms's Rep. 600. 605. Hill. 1719. *Blackborn v. Edgley.*

* At the bottom of the page is added a quere; for that in Sondag's case there is no express estate for life given to the first devisee. Ibid. 605.

MS. Tab. cites S. C. 20 Dec. 1710, and reports it thus, devise to B. for life and

22. Devise to B. for life, and after his decease to the first son of his body, and the heirs male of such first son, and so to the fourth, remainder to his sisters, provided that B. commit no waste, and after B's decease without issue of his body to a charity; adjudged and affirmed in Domo Proc. that B. had estate tail. Arg. Gibb. 13. cites Hill. 7 Geo. 1. the case of *Sutton v. Paman.*

after his death to the first son of B. or issue male of his body and to the next heirs male of such first son, and for want of such issue to the second in like manner; but goes not to the third or other sons, provided that the said B. nor the heirs male of his body shall not commit waste, or defeat the annuities or charitable bequests in this will, and then devised annuities to two sisters, and after the death of his two sisters, the trustees should apply the annuities to certain charities, adjudged in Scacc. that this was an estate tail; affirmed in the House of Lords. — This case as stated by Mr. Williams, who argued this case in the House of Lords to be thus, that A. was seized of lands in H. in fee of a legal estate, and in S. in fee of a trust or equitable estate, and by will directed B. his nephew and trustee of the land in S. to convey his land to S. to the use of his will, and devised all his lands in S. and A. to B. for life, and afterwards to the first son or issue male of his body lawfully to be begotten, and to the heirs male of the body of such first son, remainder to the said B's second son and his heirs male in tail (not carrying the limitations over to his third or other sons) and afterwards came this clause (viz.) that immediately after the death of the testator's nephew without issue male of his body the premises should go over to trustees for charities. Afterwards B. suffered a recovery and died without issue, and the question was, whether the recovery barred the charities? And that this upon an appeal from an order made by the barons of the exchequer to the House of Lords was agreed by all the lords, as to the lands in H. in which the testator had a legal estate, to be a good recovery, and the charities to be barred by it, but as to the trust lands in S. the order of the Court of Exchequer was reversed by a majority, the effect whereof was only to reverse the plea allowed by the Exchequer, and so did only put the respondents to answer over without determining the right any way against them. Wms's Reports 754. Mich. 1721. Attorney General at the relation of *Folkes and Battely v. Sutton and Payman.*

Afterwards in consequence of this order, the barons decreed, that the recovery by B. of the trust estate was void, as contrary to the trust created by A's will, and because there had been no conveyance of the lands in S. to trustees, pursuant to the directions in the will, and directed a conveyance and a perpetual injunction for quieting possession. But as to the lands in H. in which the testator had the legal estate, the court after a trial at law and a special verdict found, gave judgment for the lessors of the plaintiff, being of opinion that B. the nephew took an estate tail in H. and the court ordered the tenants to attorn, &c. Wms's Rep. 766. in a note there says, that the order of the House of Lords was 29 Jan. 1732. and that the judgment thereupon in the Exchequer was Pasch. 1737. by the name of (*Paman* being then dead) Attorney General v. Young & al. — S. C. cited Fortescue's Rep. 66. Arg. by the name of *Sutton v. Paman.* — S. C. cited Arg. 8 Mod. 247.

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23. A devise to E. M. and R. S. during their natural lives, equally to be divided between them, and after their decease to the next heirs male of their bodies, but in case either of them die without such issue,

issue, then I devise the same unto the other of them, and after his decease to the heirs males of his body, and for want of such issue of both of them, then he devised over to others, with a proviso, that if any of the devisees cut down timber, unless for necessary bootes, they should forfeit their estates; it was held to be an estate tail in M. and S. notwithstanding the estate was limited to their next heirs male; this was the unanimous resolution of the court of C. B. when the Lord Chancellor presided there, and was, as I believe, to the satisfaction of all Westminster-hall; and when this cause was brought into B. R. by writ of error, that court seemed to be of the same opinion, but as to the points of the pleading, being in a formedon, these were debated, but no question made as to the limitation of estate. Fortescue's Rep. 84, 85. cited by Fortescue J. as Pasch. 12 Geo. 1. Seagrave v. Miller.

24. A. devised lands to J. for his life, and after his decease to the heirs male of the body of the said J. S. lawfully to be begotten, and his heirs male for ever; but if the said J. S. should happen to die without such heir male; then he devised them over to W. R. &c. Per tot. Cur. this was estate tail in J. S. and that the subsequent words relied upon for the plaintiff, as (*his*) and (*if he dies without such heir male*) are not sufficient to restrain and alter the operation of the words (*heirs male*) and so qualify them, as to make a description of the person. Fortescue J. thought (*his*) in grammatical construction would properly refer to *Nicholas*, but as to that the other judges gave no opinion. But they all held that the operation of plain and clear words and a settled rule of law should not be defeated, or broke into, by uncertain or doubtful words, which they took the last at least to be. But in effect the words (*heirs males*) must be rejected to make this an estate for life only in *Nicholas*. And therefore judgment was given for the defendant. 2 Ld. Raym. Rep. 1437. 1440. Mich. 13 Geo. B. R. Goodright v. Pullyn & al.

rule, that words in a will shall give the very same estate as such words in a deed would, unless the intent of the party can be discovered to the * contrary. Accordingly they adjudged it an estate tail, remainder to his heirs in fee, and gave judgment for the defendant. Barnard, Rep. in B. R. 6. Mich. 13 Geo. Goodright v. Pullen.

The court said the words were properly words of limitation. They said too if these words had been in a deed, as they are in a will, it would have been beyond all question, that an estate tail had passed to the first taker. And they laid it down for a

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25. Devise to A. and B. two sisters of the testator *equally for their lives*, without committing any manner of waste, and if either of my said sisters A. or B. happen to die leaving issue or issues, then to such issue or issues of their mother's share, or else in trust for the survivor or survivors of them and their respective issue or issues, and if A. and B. die without issue, and their issue or issues die without issue, then remainder over, &c. In the grand sessions of Wales this was held to be an estate tail; upon error brought in B. R. this judgment was reversed but afterwards the judgment was reversed in Domo Proc. and the first judgment established. Gibb. 7. Pasch. 1 Geo. 2. B. R. Shaw v. Weigh.

26. A. devises lands to his wife for life, and for her better support, he gives and bequeaths unto her the sum of 500 l. to be raised by her, or by her executors, or administrators, by sale of timber, or by sale of any part of the premises, or otherwise, by digging, sinking, getting, and sale of coal, on the premises, or any part thereof at her's

8 Mod. 153. to 264. Trin. 10. Geo. 1. J. C. in B. R. 2 Judges of opinion that

it was an estate tail, but the Ch. Justice doubted

— Ibid. 382. Pasch.

1 Geo. 2. the whole court held that the sisters were only tenants for life, and so the judgment in the Grand Sessions was reversed. — Gibb. 729. Pasch.

1 Geo. 2. B. R. all the court held the judgment in the Grand Sessions wrong, and that it must be reversed. — Ibid. 28.

30. on error brought in the House of Lords, the Lords desired that all the judges should attend in order to deliver their opinions, and Mr. Justice Fortescue, Ld. Ch. B. Pengelly, and Ld. Ch. J. Eyre were against the judgment, but all the rest of the judges and barons * argued in support of it; but it was reversed on 28 Apr. 1729. — Barnard. Rep. in B. R. 54. S. C. and judgment in the grand sessions reversed. — Fortescue's Rep. 58. to 91. S. C. with his own argument in the House of Lords, and that the judgment in B. R. was there reversed nemine contradicente.

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Gibb. 28. S. C. decreed by the Master of the Rolls accordingly. — Abr. Equ. Cases 185. pl. 30. Pampillon v. Voice. — S. C. de-

her executor's and administrator's choice and election; and if my said wife shall happen to die before the said sum be raised, as aforesaid, then he gave her power, either by deed or will in her life-time, to appoint any person to raise the same after her death in manner aforesaid; provided nevertheless, that if either my sisters hereafter named, or such person, for whom my trustees hereafter named shall be trustees, shall pay unto my wife her executors, &c. the said sum of 500l. that the said power of selling shall cease, and after the decease of my said wife, I devise all my estate before mentioned to A. B. C. and the survivor and survivors of them, upon the trusts hereafter mentioned, that is to say, in trust for my sisters A. L. and D. E. equally betwixt them during their natural lives, without committing any manner of waif from and after the decease of my said wife; provided always that what sum or sums of money, in part, or in full of the said 500l. hereby left to my wife, shall be really paid to my wife, her executors, &c. by either of my said sisters, that in that case my will is, that such money be likewise raised by getting of coal on the premises only; and if either of my said sisters happen to die, leaving issue or issues of her or their bodies lawfully begotten or to be begotten, then in trust for such issue or issues of the mother's share, or else in trust for the survivor or survivors of them, and their respective issue or issues; and if it shall happen that both my said sisters die without issue as aforesaid, and their issue or issues to die without issue or issues lawfully to be begotten, the said trustees to stand and be intrusted to and for my kinsman J. S. and the heirs males of his body, &c. and for want of such issue, then in trust for R. G. &c. And the chief question was, whether this was an estate tail, or an estate for life, and it was adjudged an estate tail in the sisters, in the great sessions for the county of F. which judgment was reversed on a writ of error in B. R. but on a writ of error in the House of Lords, this last judgment was reversed and the first established, by the opinion of Eyres Ch. J. Pengelly Ch. B. and Fortescue J. against the opinion of all the rest of the judges, who held it only an estate for life in the sisters. Equ. Abr. 184. pl. 28. 28 April, 1729. Shaw v. Weigh.

27. A. by will devised land, and also 10000l. to be laid out in land to the same uses; viz. the 10000l. to trustees to purchase lands to be settled on B. for life, sans waste, remainder to trustees, &c. to preserve, &c. remainder to the heirs of the body of B. remainder over with a power for B. to make a jointure. And by the same will A. devised lands to B. in the very same manner. It was decreed by the Master of the Rolls, after having taken time to consider of it, that as to the lands, an estate for life only passed to B. with remainder to the heirs of his body by purchase; and as to the 10000l. the court had evidently power over that, which therefore should be settled

settled so as to make B. tenant for life only, and that his sons should take in tail male successively, &c. according to testator's intention. But L. C. King upon appeal to him declared, if the devise of the lands, though said to be fans waste, with remainder to trustees to preserve, &c. remainder to the heirs of the body of B. yet this remainder was within the general rule and must operate as words of limitation and create a vested estate tail in B. But as to the 10000l. his lordship held, as the Master of the Rolls did, and said that the diversity was where the will passes a legal estate, and where it only executory and the party must come to this court in order to have the benefit of the will; that in the later case the intention should take place and not the rules of law. 2 Wms's Rep. 471. Trin. 1728. (Hill. 1731.) Papillion v. Voice.

creed accordingly by the Master of the Rolls. — S. C. cited Arg. Cates in Chancery in Ld. Talbot's time. 8. in that of Ld. GLENORCHY v. BOSVILLE, and decreed accordingly. Ibid.

19 Mich. 1733.

28. Upon the trial of the issue in this cause, the question was, what estate the words in a will conveyed, which were these following. I devise my lands to A. for life, and after his decease remainders to the heirs-male of the body of A. and to the heirs-males of such issue male. The Ch. J. was of opinion, that they conveyed an estate tail to A. and said, that the settled distinction was, where the word (heir) is in the singular number, and a limitation made to the issue of such heir, the word heir is considered as a word of purchase and a *descriptio personæ*; but wherever the word (heirs) is in the plural number) and a limitation made to the issue of such heirs, the word heirs is considered as a word of descent and not of purchase. Barnard. Rep. in B. R. 367. Trin. 3 Geo. 2. Burnet v. Coby.

29. Devise to B. and his heirs lawfully to be begotten, that is to say, to his first, second, third, and every other son and sons successively, lawfully to be begotten of the body of the said B. and the heirs of the body of such first, second, third, and every other son and sons successively lawfully issuing, as they shall be in seniority of age and priority of birth, the eldest always and the heirs of his body to be preferred before the youngest and the heirs of his body, and in default of such issue then to his right heirs for ever. Per Cur B. has only an estate for life and not an entail; and the viz. and the other clauses are not contrary but explanatory of what heirs of the body of B. the devisor meant; and judgment accordingly by the unanimous opinion of the whole court. 2 Ld. Raym. Rep. 1561. Mich. 3 Geo. 2. B. R. Lowe v. Davis.

Barnard. Rep. in B. R. 238. Law v. Davis. S. C. adjudged by 3 J. absent Page J. and they were clear of opinion that the words under the viz. ascertained the general description of

the former and explained the testator's meaning to be that B. should have a bare estate for life, the remainder to his sons in tail, and they thought the case in 2 Vern. 449. [Barnfield v. Popham] distinguishable from this; for there the words are by way of limitation, but here they explain one another.

(C. b) Estate for Life, Tail, or Fee, by Implication. By Way of Enlargement.

1. **L**ANDS were devised to *A. and the heirs males of his body and if he dies without heirs of his body*, that the land shall remain to a stranger; it was adjudged that the words (heirs of the body) in the contingent, or condition, shall not enlarge the estate precedent, viz. heirs males of the body, but shall be referred to that and no further. Cited by Mead, Mo. 124. pl. 269. Palch. 25 Eliz. as a case in *C. B. Claxton v. Glasier*.

2. The testator made his will in these words, (viz.) *If it shall please God to take my son Richard before he shall have issue of his body, so that my lands descend to C. his brother, then, &c.* all the justices agreed, that this was a plain implication to make this an estate tail in Richard by implication. Owen. 29. 29 Eliz. Cosen's case.

3. A. has B. a son by a first venter, and C. and D. by a second venter, and devises land to *C. and D.* And *if either of them or their heirs do sell the same* the gift shall be void. It is a fee by the intent of the deviser by the word (heirs), Cro. E. 744. pl. 22. Hill. 42 Eliz. *B. R. Shailard v. Baker*.

4. So where it was, if either of them or their heirs do sell the same the land shall revert, shall not be construed an estate tail, when it does not appear his intent was to make an estate tail, but a condition. Cro. E. 745. *Shailard v. Baker*.

5. A man devised lands in London, to his son and heirs, after the death of his wife, and if his daughters overlived his wife, son, and his heirs, they should have it for life, and after their deaths J. S. should have it paying 6l. yearly to the company of Merchant-tailors London, to be bestowed in charitable uses. Resolved that the wife has estate for life by implication; Secondly, that the son had tail by implication, and not fee-simple; for as long as the daughters lived, the son could not die without heirs collateral. Thirdly, That the estate to J. S. after the death of the daughters was a fee-simple by reason of the annual payment of the money, Mo. 852, 853. pl. 1164. 1 Jac. Anon.

6. Devise to *A. for his natural life, and after his decease, I give the same to the issue of his body lawfully begotten on a second wife, and for want of such issue to B. and his heirs for ever. Provided that A. may make a jointure of all the premises to such second wife, which he may enjoy during her life.* This was adjudged an estate for life only in A. Per Twissden and Rainsford J. against Hale Ch. J. Vent. 225. 232. Mich. 24 Car. 2. *King v. Melling*.

S. C. 2 Lev. 58. and there 61. says that this judgment was reversed in the Exchequer Chamber

upon the point of law. For all there agreed that A. took estate tail. — S. C. and S. P. 2 Wms's Rep. 472. Arg.

The power for A. to make a jointure is no indication that an estate for life only and not an estate tail was intended to pass; because though tenant in tail could make a jointure, yet not without destroying the estate tail by fine or recovery; whereas the testator's intention might reasonably

be that A. should make a jointure without cutting off the entail. Cited Arg. as held by Ld. Harcourt and so reversed a decree of Ld. C. Cowper's in the case of *Bale v. Coleman*. See 2 Wms's Rep. 473, 474. Trin. 1728. in case of *Papillion v. Voice*.

7. T. H. had three sons, T. B. and R. and devises lands to B. and R. and if B. dies without heirs, R. shall have his part; * and if R. dies without heirs, T. shall have it. The question was, what estate R. had in his moiety? for it was agreed that B. had an estate tail by implication, by virtue of the words subsequent to the devise, viz. and if B. die without, &c. it was argued per Maynard, that R. should also have an estate tail, because those words that did give were the same to both of them; and then when the testator had by the subsequent words declared what estate he did intend should pass to B. when he says, I devise to B. and R. the words being the same to R. shall carry the estate in the same manner. Nudigate argued e contra, for that by the first words, if the testator had gone no farther, but only said, I devise these lands to B. and R. neither of them had had but estates for life; and then when the testator by subsequent words enlarges the estate of one of them (by saying T. shall have it) this word (it) shall relate only to B's part that was before devised to R. if B. dies without heir. And the court inclined to this latter opinion, that R. had but an estate for life in his moiety, *implications that carry estates ought to be plain and strong*; and so gave judgment nisi. Freem. Rep. 85. pl. 104. Patch. 1673. *Allen v. Spendlove*.

8. If one devises to his wife 600l. to be paid to J. S. for the lands he purchased of him, and are already settled on his wife for her life for part of her jointure, and the lands were not settled, this is a mistake in the testator, and shall not by implication amount to a devise of them to his wife for her life, it not appearing that he intended to pass these lands by his will. Adjudged per Pollexfen Ch. J. *Rokeby and Ventris*, but Powell contra, for here appears an intent that the wife should have them, and though he is mistaken as to the way of her taking by the settlement, she shall have them by such way as she may, viz. by the will, rather than his intent shall be frustrated. 3 Lev. 259. Trin. 1 W. & M. in C. *B. Wright v. Wivell*.

9. G. C. the father being seised of the lands in question made a settlement thereof to G. his son for life, remainder to his first, &c. *Skinn. 558; S. C.* son in tail male, reversion in fee to G. the father, who in June 1683 made his will as follows, viz. *As touching my lands and tenements, &c. my will is, that if my son's wife die during the life of her husband without issue-male, that then he shall have power to make a jointure to any other wife, and for want of issue male of his said son, then the lands shall be and remain to his son by any other wife, and his granddaughter shall have 4000l. and in case of failure of issue-male by his son G. then all his lands shall go to his grand-children and their heirs, share and share alike.* It will be impossible to make this an estate tail by tacking the estate by the will to the estate for life in the settlement on purpose to support the contingent remainder; because the settlement and will are two distinct conveyances; and therefore

therefore judgment was given. that this was not estate tail. 4 Mod. 316. to 319. Mich. 6 W. & M. in B. R. Moor v. Parker.

10. *A. seised of lands in fee had issue two sons B. and C. and made his will and devised several lands to B. and that B. should renounce all his right in Black-acre (of which the devisor was then seised) to C. and it was objected, that this was no devise of the land to C. 2dly, That if B. should release his right, this was intended to be only an estate for life; but because the words were (all his right) it was apparent that A. intended that C. should have fee, and accordingly they certified their opinions to the Lord Chancellor. Ld. Raym. Rep. 187. Pasch. 9 W. cited by Treby Ch. J. as lately referred by the Lord Chancellor to Holt Ch. J. and himself. Hodgkinson v. Star.*

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THIS case of POPHAM AND BARNFIELD, is misreported in Salk. 236. According to him it was a devise to A. for life, remainder to the first son of A. in tail male; and so on to the tenth son in tail male; and he has

dropped the material words, "*To all and every son and sons of his body,*" for it was not to the tenth son only as he puts it; and if *A. dies without issue male of his body remainder over*, and by a codicil annexed, he recited *whereas he had given an estate tail to A. &c.* And it was objected there, that the testator's intent appeared that A. should have an estate tail, and A. might have posthumous children, and more than ten sons, sed non allocatur; for *where a particular estate is expressly devised, we will not by any subsequent clause collect a contrary intent inconsistent with the first by implication*; and therefore they construed "*dying without issue male*" dying without such issue male. The case in truth was, a devise was made to A. for life, remainder to all and every son and sons of his body, who therefore would all be intitled to take before the remainder man; so that here being a devise to all the sons, there was no occasion to construe it an estate tail in order to fulfil the intention of the testator. Per Raymond Ch. J. who said he had seen the case. Gibb. 26, 27. Pasch. 1 Geo. 2 B. R. in case of Shaw v. Weigh.

* These words being words of limitation only, after an express estate for life and being in default of such issue could not create an estate tail, and the rather too, where it would defeat the intent of the testator (as where he limited it over to several others in the like manner) by empowering A. to whom it was limited to barr all the subsequent remainders by a recovery. Wms's Rep, 333. per Ld. C. Cowper, Hill. 1716. Humberston v. Humberston.

12. T. C. being seised in fee of lands in W. conveyed the same to the use of B. his son for life, remainder to M. his wife for life, remainder to the right heirs of B. and dies; B. by his will devises in these words (viz.) *My lands in W. my wife is to enjoy for her life, and after her death of right it goeth to my daughter E. for ever, provided she has heirs. Now if my said daughter should die before her mother, or without heirs, and my said wife M. should marry*

marry again, and have an heir male, I bequeath him all my right to that estate, not thinking I can sufficiently reward her love. B. died without issue male; having only one daughter E. who died without issue, and the lessors of the plaintiff are heirs at law to her, and co-heirs of J. C. brother of the said B. After B's death, M. married T. H. by whom she had issue the defendant. For the plaintiff it was insisted, that the lessors of the plaintiff are the heirs at law to whom the estate belongs, if it is not disposed of otherwise by the will of B. That by this will nothing passed to the defendant; for he could not take but by way of remainder, or by way of executory devise; and he could not take by way of remainder, because nothing is devised to E. the daughter; for the will does not give her any estate, but only recites the estate which she had before; for it says, his wife shall enjoy for her life, and after her decease of right it goes to his daughter for ever, provided she have heirs, which is only a narration or recital of the estates as they were by the marriage settlement. And afterwards judgment was given for the plaintiff upon the first point, and here was no devise to E. and then the first son of the wife by her second husband could not take by way of remainder. Comyns's Rep. 232, 233, 234. pl. 130. Mich. 2 Geo. B. R. Right v. Hammond, &c. 21'.

13. *If he dies without issue, or before issue, or if he departs not leaving issue, or if he dies not having a son, all these limitations create an estate tail. Arg. 2 Vern. 766. Trin. 1719, in case of Pinbury v. Elkin.*

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Cro.E. 26.
Lee v. Vin-
cent, S. P.
—Le. 285.

S. C.—Vent. 230. S. P.

14. The holding an estate tail good by implication is *always in maintenance of the intention of the deviser. Arg. 10 Mod. 403. Pasch. 4 Geo. 1. in Canc. in case of Target v. Grant.*

15. *And per Parker C. it is ever in favour of the heir at law that an estate tail is created by implication, to whom no estate being given by the will so as to enable him to take by purchase, and there being necessity (if he takes at all) of his taking by descent, wherefore to support the intention of the testator that the heir should take the law creates by implication an estate tail in the ancestor to vest it in the issue by descent. 10 Mod. 403. Pasch. 4 Geo. 1. in Canc. in case of Target v. Grant.*

16. *But where there is a provision how it shall go to the issue this reason ceases, as where in the principal case it was devised to go in remainder to such of the issue of the devisee for life as the said devisee for life should devise the same unto; in this case, until such devise made by the devisee, nothing vests in the issue, per Parker C. 10 Mod. 403. Pasch. 4 Geo. in Canc. Target v. Grant.*

17. R. W. seised in fee of the lands in question had *two sons R. and G. and by his will devised in these words, viz. I give to my wife J. all my freehold lands in C. in the county of E. (being the lands in question) and after some other bequests he says, I give to my son G. my freehold lands in C. after my wife's decease; and if it shall happen that my son G. should die before he attain the age of 21 years, then*

then the said lands shall descend to my son R. and his heirs for ever; R. was the eldest son and heir of the testator, G. was his younger son by a second wife; G. attained his age of 21, and by his will devised the lands to his sister, the wife of the defendant and her heirs, and then died in the life of J. his mother. The lessor of the plaintiff claimed under R. and it was referred by Eyre J. whether G. had an estate in fee, or only for life; and it was insisted that G. took a fee, for if he had only an estate for life, he took nothing, and the devise that R. his heir should take if G. died under age, imports that he should not take, if he did not die under age; but by Eyre J. here is no devise to the heir of G. and no one shall take against the heir without an express devise to him. Judgment for the plaintiff. Comyns's Rep. 353, 354. pl. 177. Mich. 7 Geo. C. B. Fowler v. Blackwell, & al'.

18. If lands are devised to trustees, without any words of limitation to support the trust of estates of inheritance, they by implication must have an estate of inheritance sufficient to support the trust; for there is no difference between a devise to a man for ever, and to a man upon trusts, which may continue for ever. Adjudged. Eq. Abr. 176. pl. 8. cites Pasch. 1 Geo. 2. in B. R. in case of Shaw v. Wright.

MS. Rep.
Mich. 2
Geo. 2. in
Canc. Lady
Jones & al'
v. Ld. Say
and Seal &
al'.

19. Mrs. Frances Ellis by will dated 10 December 1685, devises all her manors, messuages, lands, tenements and hereditaments in A. B. and C. in the counties of Gloucester and Surrey to Thomas Earl of _____ in the county of Dorset Esq; and Charles Morgan of the Inner Temple Esq; their heirs and assigns for ever, upon trust and confidence nevertheless, but not upon condition that they and the survivor of them, and the heirs of such survivor, shall and will in the first place, out of the rents, issues and profits of the said manors, &c. pay and satisfy the several legacies, devises and bequests herein after mentioned, viz. Imprimis, she gives and devises an annuity of _____ to Jane Masters for life, and then devises other annuities for life to other persons, to be paid out of the rents and profits, and after her trustees re-imbursing themselves their costs and charges, she doth appoint her trustees to pay all the rest and residue of the rents, issues and profits to the proper hands of her daughter Cecil Fiennes, or to such person or persons as she shall by any writing or writings under her hand and seal direct and appoint for and during the term of her natural life, and from and after her decease, the trustees to stand and be seised of the premises to the use of the heirs of the body of her said daughter Cecil Fiennes, severally and successively as they shall happen to be in priority of birth and seniority of age, and to the heirs of their respective bodies in tail general subject to the payment of the several annuities. And in case of failure of the issue of the body of her said daughter Cecil Fiennes, then to the use of lady Catherine Jones, &c. Cecil Fiennes and her husband levied a fine, and suffered a recovery of the premises, and died without issue, under whom the defendant Lord Say and Seale claims the estate, and Lady Catherine Jones claims under the will of Mrs. Frances Ellis by virtue of the remainder limited to her by the said will,

Talbot,

Talbot, Solicitor General, and Mr. Mead for the plaintiff, argued, that Cecil Fiennes took only a trust estate for life by the will, with a contingent remainder to the heirs of her body in tail general, and consequently the fine and recovery by Cecil Fiennes could not bar the remainder given to the plaintiff by the will of Frances Ellis, that the direction to the trustees to pay the rest and residue of the rents and profits, after payment of the several annuities to the proper hands of Cecil Fiennes, who was a married woman, was a bare trust, and not an use executed by the statute of 27 H. 8. of uses. It was a trust for her separate benefit, and for the benefit of the annuitants, and to construe it an use executed would subject it to the power and controul of her husband, contrary to the plain intent of the testatrix.

That the subsequent limitation to the heirs of her body severally and successively as they shall be in priority of birth and seniority of age, and to the heirs of their respective bodies in tail general, is an use executed by the statute, and cannot be consolidated with the precedent trust limited to Cecil Fiennes for life to create an estate tail by operation of law in Cecil Fiennes, and thereby put it in her power to defeat the intention of the testatrix. And as to the subsequent words, viz. In case of failure of issue of the body of the said C. F. then to the plaintiff Lady Catherine Jones, &c. these words do not create an estate tail in Cecil Fiennes by implication, but only connect the remainder over with the precedent estate, but don't enlarge the precedent estate, because no legal estate vested in Cecil Fiennes.

The Attorney General and Mr. Lutwiche for the defendant argued, that if the first estate devised to Cecil Fiennes be a trust, why is not the subsequent limitation to the heirs of her body a trust likewise? The legal estate is given to the trustees and their heirs, and if the legal estate passes to them in fee, all the subsequent uses are uses upon an use, and consequently trusts not executed by the statute 27 H. 8. and if the estate given to C. F. for life, and the subsequent limitation to the heirs of her body be likewise a trust, these two trust estates will be consolidated together, and create an estate tail in equity, and then the fine and recovery will operate upon an estate tail in equity, as well as upon an estate tail at law, and bar the remainders, and in this case either both estates are executed by the statute, or neither, and take it either way, the remainder to the plaintiff is barred.

King C. was of opinion that by the words of the will the use was executed in the trustees and their heirs during the life of Cecil Fiennes, and she had only a trust in the surplus of the rents and profits, after payment of the annuities during her life, but by the subsequent words, viz. That the trustees should stand seised to the use of the heirs of the body of Cecil Fiennes, &c. subject to the payment of the annuities, the use was executed in the persons intitled to take by virtue thereof, chargeable with the payment of the annuities, and therefore there being only a trust estate in the ancestor, and an use executed in the heirs of her body, those different interests could not unite so as to create an estate tail by operation

operation of law in the ancestor, and decreed accordingly for the plaintiff, who was next in remainder under the will.

(D. b) Estate for Life, in Tail, or Fee. By Words of Restriction or Implication.

1. **I** F a man devise his lands to three and to his own heirs, and that the one shall take the profits, and dies; the person dies; the other shall be compelled by subpoena to make an estate, or release to the heir of the devisor; for this devise shall be taken to be to the use of the person for his life, and after to the use of the feoffor and his heirs; quod nota. Br. Feoffments al. Uses, pl. 49. cites 30 H. 6.

Ow. 29, 30.
29 Eliz.
Cofens's
case. S. P.
and seems
to be S. C.
agreed by
all the
justices,
that it was
a plain im-
plication to make an estate tail.

2. A. had issue B. C. and D. sons; B. dies leaving his wife enfeint; A. devises to the child my son B's wife now goes with 20 l. yearly to be paid to the use of the child for 20 years, and if my son C. die before he has any issue of his body, so that my land descend to D. before he comes to 21 years, then, &c. C. by implication of the will had estate in tail, as well by the words (if he die before he hath issue) as if it had been (if he die without issue). Mo. 127. pl. 275. Pach, 25 Eliz. Newton v. Barnardine.

3. If a copyholder surrenders to the use of his will, and after devises part to A. other part to B. and the rest to C. and if A. B. and C. live till of age, and have issue, then to them and their heirs, to give and sell at their pleasure; and if one of them die without issue, wills that the other, or others, shall have all the lands; and if all die without issue, that his executors shall sell the same, and give the money to the poor. It was agreed by all, that by the first words of the will the three devisees had but an estate for life; and afterwards resolved, that no estate tail is created by the will, but that the fee simple is settled in them when they came to their lawful age and have issue, and so the residue of the devise is void; and judgment accordingly. 2 Le. 68. pl. 92. Trin. 27 Eliz. C. B. Brian v. Cawfen.

9 Le. 115.
pl. 155.
S. C. in
totidem
verbis.

4. Devise to his wife for life, and that after her decease that his executors should receive the profits till 900 l. should be raised for the preferment of his daughters; and after that sum was levied, then the lands shall remain to his right heirs males for ever; and if his heirs males should disturb his executors in receiving the profits, then their estate shall cease, and the lands shall be divided amongst his daughters then living. The heir male made a lease to the plaintiff; the daughters entered, and the lessee brought an ejectment; but judgment was given against him. Cited by Hobart Ch. J. Hob. 34. as adjudged Mich. 7 Jac. B. R. Rot. 115. as Ashenhurst's case, alias, Ashenhurst v. Curtis.

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Cited Arg.

5. A. devised that if his daughter B. married J. S. then his lands should be and remain to B. and the heirs of her body, but if B. died

B. died without issue, then after the death of B. and J. S. they should be and remain to C. and D. Afterward B. married J. S. and died without issue. J. S. survived. The court of Chancery decreed the profits to J. S. for life, but upon appeal to the Lords this decree was reversed. Parliament Cases 87. Wood, alias Cranmer v. D. of Southampton.

8 Mod.
221.—
S. C. cited
Arg. 2
Vern. 377,
and that it
was resolved
in the

House of Lords, that *no trust being declared during the life of J. S. (but only from and after the death of J. S. and B. without issue, and B. being dead without issue, and J. S. yet living,) that during his life the trust refused, and descended to the heirs at law of A.*

6. Devise of lands in trust for *A. for life, with power to make leases, and from and after her decease in trust for the heirs male of the body of A.* Cowper C. decreed an estate for life only to be conveyed to A. and to his first and other sons in tail male. But Ld. Harcourt decreed an estate tail to A. and the heirs male of his body, it being by will, but admitted it might be otherwise on marriage articles founded on the agreement of parties. But in a will you must take the words as you find them. 2 Vern. 671. Pasch. 1711. Baile v. Coleman.

Wms's
Rep. 142.
S. C.—Cro.
E. 313. pl.
5. Hill. 36
Eliz. B. R.
S. P.—

This power
to make
leases is so
far from
restraining

the estate from being a tail, that it is an improvement of the estate tail itself, in regard that by the statute H. 8. the power of leasing thereby given to the tenant in tail, will bind only the issue, and not the remainder or reversion, but now *by this express power the leases made in pursuance thereof will bind the remainder or reversion as well as the issue, and such leases so made are good without fine or recovery.* Per Northey Attorney General. Arg. Wms's Rep. 144. and admitted per Lord Harcourt. Ibid. 145. Pasch. 1711. Bale v. Coleman.

7. William Stawell of Bovey Tracey Park in the County of Devon, by his will dated 2d June 1702, did devise and bequeath unto William Coleman of Gornhay in the said county of Devon, Eliz. Bale, wife of Christopher Bale Esq. and William Bogan the son of Walter Bogan of Gatecomb Esq. and John Legassick of Little Hempston, clerk, *all his lands, manors, tenements, messuages and hereditaments whatsoever, situate in the counties of Devon and Cornwall, to have and to hold the same unto them the said William Coleman, Eliz. Bale, William Bogan, and John Legassick, their heirs and assigns for ever, to the intent they the said W. C. E. B. William Bogan and John Legassick should after his decease sell and dispose of all or any part of the said lands, manors, &c. and with the money to be raised thereby to pay and discharge all his debts, and then declared that his will was, that all his just debts and legacies should be punctually paid, after which he gave devised and bequeathed unto the said William Coleman, Elizabeth Bale, William Bogan and John Legassick, their heirs and assigns for ever, equally to be divided between them, all such lands, manors, &c. as should be and remain over and above the discharge of his debts and legacies, and further declared, that the estate of inheritance he had thereby given, devised and bequeathed unto the said John Legassick, his heirs and assigns, was in trust to, and for the said William Bogan, his heirs and assigns.*

MS. Rep.
Trin. Vac.
8 Ann. and
Pasch. 10
Ann. in
Canc. Bale
v. Coleman,
& al'.
which is the
S. C. as the
above; but
is more
fully re-
ported than
in either of
the above-
mentioned
reports.

Afterwards the said William Stawell made a codicil, and annexed it to the will, dated the 10th of the said month of June, which was in these words, *Item, my will is, that after my debts and legacies are paid, and a dividend made of the remainder of my*

manors,

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manors, lands, tenements, rents, reversioners and hereditaments, by and between the said William Coleman, Eliz. Bale, and William Bogan, and their heirs and assigns, that notwithstanding the express words in my will to Eliz. Bale and her heirs and assigns for ever, I do hereby declare, and my will, intent, and meaning is, and my desire is, that it be so taken and construed in law, that that part of my said manors, lands, tenements, &c. which shall happen to fall for the share and dividend of the said Elizabeth Bale, shall be and remain to such uses, intents and purposes as are herein after mentioned and expressed, and to, and for no other use, intent or purpose whatsoever, i. e. to and for the use and behoof of the said Elizabeth Bale, for and during the term of her natural life, with power of letting, setting, and leasing all or any part of such share or dividend for 99 years determinable upon one, two or three lives, either in possession or reversion, and after her decease to the use and behoof of her son my cousin Christopher Bale, for and during the term of his natural life, with the like power of letting, setting, and leasing in all or any part of such share or dividend for 99 years, determinable upon one, two or three lives, either in possession or reversion, and after the decease of the said Christopher Bale, then to the use and behoof of the heirs males of the body of the said Christopher Bale, lawfully to be begotten, and for default of such issue to the use and behoof of the said William Coleman, and William Bogan, their heirs and assigns for ever, equally to be divided between them.

Some short time afterwards the testator died, and there being a defect in the will, by not enabling the said John Legassick to act as a trustee for the 4th part devised unto William Bogan an infant, and to sell the said estates, the said Mr. Stawell dying much in debt, and his lands being mostly mortgaged, &c. an act of parliament was in the second year of the now queen passed, enabling the said William Coleman and other trustees to make sale of lands for the payment of the debts and legacies of the said William Stawell deceased, and after the payment of the said debts and legacies, the said Act did direct that the said William Coleman, Eliz. Bale, and John Legassick, and the survivor of them the said William Coleman, and Eliz. Bale, should make a division of the overplus, according to the directions of the will. But no notice is taken of the codicil in the act of parliament.

In Hill. Term. 1 Ann. a fine was levied by Eliz. Bale and her husband, of a moiety of all Mr. Stawell's estate to one Tristran Bowdage, in order that a common recovery might thereupon be had, and suffered (as it was intended) to bar the estate tail limited to Christopher Bale the son, and the heirs males of his body, and accordingly a præcipe was brought by Thomas Bowdage against Tristran Bowdage, who vouched Elizabeth Bale and Christopher Bale her son, who vouched over the common vouchee, and this fine and recovery were declared to be to the use of Christopher Bale the son, and his heirs after the death of his mother. Note, at this time none of the debts and legacies of Mr. Stawell were paid, or but to the amount of 120 l.

But the debts being all now paid, Christopher Bale the son preferred his bill against Coleman, his father and mother, William Bogan and John Legassick, that they might come to a dividend of the overplus of Mr. Stawell's estate now remaining, after his debts and legacies were paid, and insisted, that there being an estate vested in him and his heirs after the death of his mother, by the said fine and recovery, he ought to have such estate settled in him upon the dividend.

Mr. Coleman then prefers a cross bill against the said parties, and prays that a dividend may be made of this estate, and that the court would direct what estate should be limited by the division-deeds to the said Christopher Bale the son, he insisting that his estate was but in contingency until after the debts and legacies paid, and a dividend made, and that the words in the codicil did declare a trust of the dividend of Mrs. Bale's share, which when it comes to be put in execution by a court of equity, shall be executed according to the intention of the testator expressed in the codicil, and that the limitation ought to be after the death of Mrs. Bale to Christopher Bale her son, during his natural life, with power of letting and leasing as aforesaid, remainder to the first and other sons of the said Christopher Bale the son, and to the heirs males of the body of such first and other sons, remainder over to William Coleman and William Bogan, and their heirs, &c.

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Upon the hearing of this cause before my Lord Chancellor Cowper, he declared his opinion for the plaintiff Coleman, and directed that an account should be taken of Mr. Stawell's estate, and that what remained should be divided into four parts, and that the fourth part which should fall for the share of Mrs. Bale, should be limited to the use of her for life, with such power of leasing as in the codicil, and after her decease to the use of Christopher Bale her son during his natural life, with the like power of leasing, and after his decease to the first and other sons of his body, and to the heirs males of the body of such first and other sons, remainder to W. C. and W. B. and to their heirs and assigns.

In the arguments of this case two points were made,

1st. Whether this overplus should be divided into three parts or four parts.

2dly. What estate was to be limited to Christopher Bale the son upon such division as aforesaid.

As to the first point that depended upon the words of the codicil, whereby it was declared that after the dividend made between the said William Coleman, Elizabeth Bale and John Legassick their heirs and assigns, Mrs. Bale's share and dividend should be to such use as aforesaid; for here the dividend is mentioned to be made but between three persons. But my Lord declared that the estate should be divided into four parts, one moiety whereof was to belong to the said William Bogan; for though the words here seem to imply, that this estate ought to be divided into three parts; yet they have relation to the will itself, and by that it is expressly said that the estate shall be equally divided amongst Coleman, Bale, Bogan and Legassick.

As

As to the second point my Lord said, that a *distinction* would govern this case, i. e. *when an estate was executed, and when it was only executing*, and therefore if in this case a devise had been to the son for his natural life, with such a power of leasing as is before mentioned, and after his decease to the heirs males of his body; this would have been an estate tail in the son executed; for though the party's intention was plain that he should have an estate for life only, yet the law executing these two limitations into an estate tail, equity will not interpose, but as the tree falls so it must lie. But when an estate was only executory, and something was to be done before any estate could be vested or executed in the party, this court will direct the conveyance, not that it shall be in the words of the will, but according to the intention of the party. Now in this case after the debts and legacies paid, the devise is to Mrs. Bale and her heirs and assigns of one 4th part in common, and when this division directed to be made is completed, the limitation to the son is to arise out of a divided 4th part, so that the codicil is a declaration of the use or trust of this 4th part, and though the words of the codicil be that it shall be so taken in law, yet these words are not of any weight, so as to make this a legal estate executed.

[268] And then this being but a trust, this court will direct the execution of it, and the intent of the testator here was plain, that this son should have but an estate for life; for it is limited to him during the term of his natural life, with a power of leasing for 99 years, and goes on and says, and after the decease of the son, then to the heirs males of his body, with a remainder over, and as to an objection that was made, that it was the intention of the devisor that this son should have an estate tail, because he had by the codicil a greater power of leasing than was given to a tenant in tail by the statute. It was well observed at the bar, that no such inference could be made of the party's intention, for that the power of leasing was annexed to the estate for life, and therefore when that estate was merged by the accession of the estate limited to the heirs males of the body of the son, the power of leasing annexed to that estate was destroyed with it; so that upon the whole he decreed as above; for in the case of a will or articles where a thing is to be executed, the intent of the party shall be pursued.

A point in this case was spoken to about the validity of the fine and common recovery, viz. That the fine and recovery could not bar this estate tail, (supposing it to be one) it being but a possibility or a contingent interest after the debts and legacies paid, and a dividend made according to PELL and BROWN's case, but no opinion was given to this point, because the fine and recovery could not signify anything as this case stood, seeing my Lord's opinion was, that C. B. the son ought to be made tenant only for life with power of leasing, &c.

Afterwards (Pasch. 10 Ann.) this cause was re-heard before my Lord Keeper, Sir Simon Harcourt, upon the plaintiff Bale's petition, and my Lord was of an opinion to vary the former decree, by directing that Mrs. Bale's divided 4th part should after her death be conveyed

1 Chan.
Cases, 49.
171. 2
Chan. Cases,
67. 78. 8
Mod. Cases,
143. 1 Vern.
13. 126. 440.

conveyed to the use of her son C. Bale in tail, and the said former decree was accordingly varied as to this limitation.

My Lord said, that he had a great respect for his predecessor, but that he must determine causes according to his own conscience, and could not agree with this decree, and added, that this case differed from the case of articles, where the intent of the parties was to be regarded; they are to be looked upon as purchasers, the nature and matter of these articles is to fix estates in families, and it would be absurd to make such a construction of them as to be of no effect. *In the case of a devise* there is no purchaser, no contract, no family to be provided for; yet here it is said *the intent ought to govern, but then this must be a manifest and certain intent*, and not an arbitrary one. It must be according *as it appears upon the will*, and according to the known rules of law, it is *not to be left to a latitude, and as it may be guessed at*. In this case there is a devise jointly to trustees till debts and legacies are paid. What if the estate had been charged and subjected for this purpose, and after this the testator had devised in the same words as in the present will? this court had no power over it. Doth a devise of a legal estate alter this case? It is the same as if there had been no trust. Trusts in a will shall have the same construction as a court of law could make upon the same words. At law it is agreed that Christopher Bale would be tenant in tail, it is the same thing here, a precedent trust will not alter a subsequent estate.

It was argued for the plaintiff, that the limitation for life to the plaintiff, with power of leasing, was prima facie an estate for life, but the limitation over made him tenant in tail by necessary operation of law. Equity will not alter a limitation from what it was at the common law, the limitation of a trust in a will must be executed, as the same words will execute in case of a legal estate; whatever the intention of the parties is, the operation of law must over-rule it, 1 Vent. 214, 215. 2 Lev. 58, 59. *The King v. Melling.*

In many settlements a power of leasing for longer terms than is granted or allowed by law to tenants for life, or tenants in tail may be appointed them by way of use, which will be good against the remainder-man or reversioner, though a tenant in tail cannot by the 32 H. 8. grant any greater estate than for 21 years or three lives. So the power here, to C. B. the son, will have its effect; here are expressly devising words to C. B. and the heirs of his body. It is not executory but an absolute disposition. In marriage articles equity interposes to preserve the estate according to the contract and agreement of the parties.

On the other side it was insisted upon to have the purport of the former decree, and that this case was like to the case of articles in consideration of a marriage.

If this court could not support the former decree, upon executing of conveyance, the estate for life limited to the plaintiff, and the power annexed to it would cease, the testator being no lawyer, his intent ought to be followed, though he had not expressed it in proper terms.

In the case of *PRIN v. PRIN*, before Lord Chancellor Cowper, Prin gives a bond to settle an estate according to articles, which was to P. for life, remainder to the heirs males of his body; he makes a settlement in these words, and then suffers a common recovery; an action is brought upon the bond, &c. And it was decreed that P. should execute a new conveyance, and should settle the lands to P. for life, remainder to his first son, and the heirs males of such first son; in this case there is no estate executed, but the execution is under the direction of the court.

In the case of *SERGEANT MAYNARD's* will, one moiety of certain lands was to be settled upon my Lady Hobart for life, with a limitation to trustees to preserve contingent remainders, remainder to the heirs male of her body; it was decreed that an estate should be conveyed to the first son of my Lady Hobart; for when a person comes here to have a trust executed, equity will always follow the intent of the testator.

In the case on my *LADY SHIPWITH's* will, where she devised an estate to Leonard, and the heirs males of his body, with remainder over, but declared that it should not be in his power to injure the remainder-man, the construction here was that he should be only tenant for life, yet this was a direction contrary to the words of the will; for the intent of the testator is always the measure of such constructions.

On the reply it was said, that the Lady Shipwith's will did not come up to the present case; for there was an express direction that the remainder-man should not be injured, and as to Serjeant Maynard's will, he had cut out a proper method for creating a great estate but for the life of the lady; for he in the beginning of the will directed after her death a limitation to trustees to preserve contingent remainders, from whence it was plain that she should have but an estate for life. It was decreed as above. *MS. Rep. Trin. Vac. 8 Ann. and Pasch. 10 Ann. in Canc. Bale v. Colman, & al' et e contra.*

8. *The father in his will taking notice that his son J. had much disobliged him, declares thus, I do therefore resolve not to give him any more than 20 l. a year for life, to be paid him quarterly. N. B. This was a bastard son, to whom the father had by a former will given 80 l. a year, but in the second will he took notice of his ill behaviour at the university, and devises that estate to his legitimate son. Per Master of the Rolls, the bastard son shall take nothing by this will, the words not amounting to a devise. Hill. 4 Geo. 1717. Holder v. Holder.*

9. If an estate be devised to a man and his heirs, and if he die without issue, remainder over, these words are explanatory of the word heirs, and make an estate tail. *Comyns's Rep. 539. pl. 222. Pasch. 9 Geo. 2. Brice v. Smith.*

(E. b) Estate for Life, in Tail, or Fee; by Reason of Things precedent, to happen, or to be done.

1. **TESTATOR** devised that his son should have the profits of his lands till he comes to twenty-one, and afterwards to him and his heirs, and if he die before twenty-one, that then his daughter shall have it to her and her heirs. The son died before twenty-one. It was ruled that the daughter should have it. 2 Roll. Rep. 197. cites 6 & 7 Eliz. Moulton's case.

2. Devise of lands to A. till his eldest son should be twenty-four, and that if his son dye before his age of twenty-four without heir of his body, then to remain over to J. S. The son lived to twenty-four; this is no estate tail; for no tail was to rise before his said age, and so can never take effect, and the fee simple descends and remains in the son, unless he dies before twenty-four, and then the entail vests with the remainder over. 2 Le. 11. pl. 16. Hill. 20 Eliz. C. B. Hind v. Sir John Lyon.

3. A. seised in fee has three sons B. C. and D. and devised to B. and C. several certain part of other land and to D. the land in question without mentioning of any estate they should have, and this was in reversion after the death of the wife, and with this further clause, that if any of the sons should marry and have issue male of their bodies and die before his entry into the land, then he wills that his issue shall have his part; after which D. takes wife and had issue male in the life of the wife of the devisor. The wife of the devisor dies. D. enters into his part, and pays his portion of 10 l. apiece to the daughters of the devisor charged by the devise, and dies; but he not dying before entry he had but estate for life, according to the express words of the will; for marrying, having issue male, and death before entry, are three things precedent to the tail: and judgment accordingly. Mo. 464. pl. 650. Pasch. 39 Eliz. B. R. Bacon v. Hill.

4. Devise to A. (his eldest son) in tail on a limitation to cease for non-payment, remainder to B. in tail male, and so to C. and D. and upon cesser of A's estate by failure, then to B. C. and D. and to their several heirs for ever, as before is limited, equally to be divided among them. On A's failure, this devise wholly revokes and controlls the other remainders of the former part and leaves the fee simple expectant in the heir of the devisor. Cart. 175. Hill. 18 & 19 Car. 2. C. B. Rundall v. Ely.

5. Devise to M. daughter of my son-in-law B. if my son B. happen to have no issue-male after the decease of wife, and if B. have issue male then my will is, that M. shall have 5 l. paid her in lieu of the said lands. Devisor died; the wife died. B. had issue-male then living. Keeling Ch. J. thought it was a perfect estate tail in B. and that the 5 l. need not to be tendered to M. but she might

3 Le. 64. pl. 96. S. C. in totidem verbis.—
Ibid. 70. pl. 107. S. C. in totidem verbis.

Cro. E. 497. pl. 12. S. C. Gawdy held that D. should have estate tail, but the other three justices e contra.

Sid. 445. pl. 4. S. C. the court were of opinion that the devise to M. was conditional

and that B. sue the executor for it. 2 Saund. 111, 112. Pasch. 22 Car. 2. Allen v. Rivington.

of the death of the wife, M. is to have 5 l. and not the land.—2 Keb. 606. pl. 37. S. C. Keeling conceived this an ordinary entail, T. being the heir in tail, the reversion is to the daughter who is general heir, Twisden conceived this a contingent, as if given to the daughter, if after the death of the wife the son died without issue, nothing being thereby given to the son more than to a mere stranger; Keeling held this a mere limitation as to the daughter in fee on death of the son without issue, unless circumscribed by a certain time when he should die without issue; but Moreton absente, adjournatur.

[271] 6. Lands were devised to J. S. in fee in trust for J. K. and the heirs of her body, and if K. died without issue to J. for life, &c. then comes another clause that if K. died without issue, and J. be then dead, then and not otherwise, he gave the land to J. N. and his heirs. K. dies without issue, and J. survived and died. Decreed, that J. N. shall nevertheless have the estate; for the sentence ("and J. be then dead") seems to be put in to express his meaning, that J. should be sure to have it for her life; and to shew when J. N. should have it in possession. 2 Vent. 363, 364. Hill. 35 & 36 Car. 2. in Canc. Anon.

7. A. possessed of a term devised it to an infant *en ventre sa mere*, provided it be a son, and if it be a son and he dies in its minority, then to B. The executor assented, but the child was a daughter; it was adjudged on a special verdict that B. cannot take, because here is a condition precedent which never happened and the executor's assent is not material, where there is no devise. Comb. 437. Trin. 9 W. 3. B. R. Eftcourt v. Warry.

(F. b) Estate for Life, in Tail, or Fee, by Words of Reference.

Adjudged accordingly, S. C. Cro. E. 109. pl. 5. —Cro. E. 436. pl. 50. Rofs v. Morris, is upon a D. P.

1. DEVISE to A. and if he die without issue living B. that then the feoffees should be seised to the use of the said B. and after his decease *ad usum rectorum hæredum in perpetuum secundum antiquam evidentiam inde ante factam*, averring a deed of tail 200 years old; per Wray, it shall be intended the testator had no special remembrance of a deed 200 years old, and that his lands should go according to the law, according to all his evidences which he had of his lands and that is a fee simple. 2 Le. 23. pl. 29. Pasch. 30 Eliz. B. R. Rofs v. Morrice.

2. If a man seised in fee of White-Acre and Black-Acre devisable, and devises White-Acre unto J. S. to have and to hold to him and the heirs of his body begotten, and devises Black-Acre unto T. K. to have and to hold in the same manner and form as J. S. holds White-Acre, by these words T. K. shall have an estate tail in Black-Acre and the reason is, because that the will and the intent of the giver shall be observed. Perk. S. 561.

2 Salk. 225. pl. 4. Milford v. Smith. S. C.

3. A. by deed in consideration of the marriage of B. his son and a portion with B's intended wife covenants to levy a fine to the use of B. and his intended wife for life, remainder in tail to B. remainder

mainder to the right heirs of A. *A. levied no fine but made a will, in which are these words; Item, I do ratify and make good all those my estates made or granted in marriage to B. my son, according to the writing made by me in trust.* B. has estate tail. 4 Mod. 131. Trin. 4 & 5 W. & M. in B. R. *Smith v. Milford.*

lands and such estates as were intended to be conveyed by the deed and fine; for the word (grant) in a will is not to be taken strictly, but largely for any agreement.—Show. 350. *Winsford v. Smith.* S. C. held that the lands passed by the will, because the intention of the party does sufficiently appear.—Comb. 105. *Princeford v. Smith* S. C. the whole court held it a good devise of an estate tail, and judgment accordingly. — S. C. cited Arg. Comyns's Rep. 460.

Resolved per Cur. that the will had reference to the deed and passed such

(G. b) What Words make a Special and what [272] a General Tail.

1. **D**EVISE to A. and the heirs males of his body, and if he die without heirs of his body, then the remainder to B. and his heirs males, &c. A. has only a special tail; for the subsequent words explain the intent. D. 171. a. pl. 7. Mich. 1 & 2 Eliz. Frencham's case.

611.—And 3 Mod. 82. 611. Arg. in case of *Friend v. Bouchier.*—In such case the general limitation shall not alter the special tail for the intent is apparent. Arg. Goldsb. 135. pl. 31.—S. C. cited by Hale Ch. J. Vent. 230. For an implication of an estate of inheritance shall never ride over an express limitation of an inheritance before.—S. C. cited 4 Mod. 318.

2. A. devises land to B. and his heirs males, and if he die without heir of his body, then the remainder to B. in fee. Adjudged that B. has but special tail to him and his heirs males. D. 171. Marg. pl. 7. cites Hill. 17 Eliz. Anon.

3. A. had issue B. and C. by two several venters and devises to B. and the heirs males of his body, and for default of such issue to the heirs males of A. and the heirs males of their bodies, and for want of such issue to the right heirs of the devisor. This is a limitation in tail to the heirs males of the body of A. so that C. may claim an estate tail, as by purchase, and it does not vest in B. only as heir male to A. and not by purchase, nor does the inheritance vest in him. Cro. C. 23. pl. 16. Mich. 1 Car. C. B. *Hodgkinson v. Whood.*

4. A. by will devised to M. his niece and the heirs male of her body, upon condition, and provided that she intermarry with and have issue male by one surnamed Searle, and in default of both conditions, he devised to N. (in the same manner) and in default thereof he devised to B. for sixty years, if he so long live, remainder to the heirs males of the body of the said B. and their issue male for ever; adjudged that the estate devised to M. was a good estate tail, and so was the estate to N. but it is a special intail; it is an estate to her and the heirs males of her body begotten by a Searle, which is a middle intail; not the highest or the least; for it might have been to her and the heirs of her body begotten by J. Searle, which had been more particular; yet this is a good estate tail within the statute.

de Donis, for it is within the reason of the statute; but this is a limitation and not a condition and so not barrable by M. and N. by common recovery. 2 Salk. 570. pl. 6. Trin. 3 Ann. B. R. Page v. Hayward.

See tit.
Portions (1)
pl. 12.
King v.
Withers.

(H. b) Relation. To what Time the Will, and the Devises therein, shall relate.

Cro. E. 532.
pl. 64.
Mich. 38
39 Eliz. S.
P. and same
diversity
taken per
Cur.

1. **A.** Has a nephew and a niece his next of kin, and devises lands to his nephew in tail, the remainder to the next of kin of his name. Nephew died without issue. If the daughter was married at the death of A. she shall not take the land; but if she was *unmarried* at his death, though married at the death of her brother, and so had not lost her name, then she should have the land. Cro. E. 576. pl. 23. Trin. 39 Eliz. C. B. Jobson's case.

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2. Two joint-tenants, copyholders in fee, one surrendered into the hands of two tenants to the use of his last will, and makes his will of the land and dies; the surrender is after presented. Resolved that it shall bind the survivor, for being presented it shall relate to the first time of the surrender. Cro. J. 100. pl. 30. Mich. 3 Jac. B. R. Porter v. Porter.

3. Devise takes effect in the life of the devisor. Arg. Sti. 409. Hill. 1654, in the case of Swan v. Fenham.

4. A. devises four houses to his wife in satisfaction of her dower, and gave her election to take either the one or the other, the dower or the legacy. Afterwards A. sold one of the houses and died without new publishing the will. The wife prayed satisfaction for the house sold; but per Finch C. she must take the will as it was at the time of the death of the husband, for till then it is no will. Let her choose the one or the other, for she may not have both, and decreed accordingly: 2 Chan. Cases 24. Hill. 31 & 32 Car. 2. Axtell v. Axtell.

5. Devise of goods to A. for life, and after the decease of A. to the heir of B. B. dies living A. Decreed the goods to go to him that was heir of B. at B's decease, and not to him that was heir at the death of A. Vern. 35. pl. 34. Hill. 1681. Danvers v. E. of Clarendon.

3 Vern. 621.
S. C.

6. Lands not now in settlement shall carry lands that were settled at the making of the will, but whose uses are determined though they were not determined, but by his death, as being tenant in tail. 3 Ch. R. 139. Trin. 7 Ann. Litton alias Strode v. Falkland.

7. A will shall have relation only to testator's death, and not to the making, for till his death he is master of his own will, and therefore a will of a papist in Ireland was held to be avoided by a subsequent statute made in that kingdom, which enacts, that the lands of

of papists there shall not be devisable, but descend in gavelkind, MS. Tab. Jan. 28, 1717. *Burke v. Morgan.*

(I. b) What Words will pass a Reversion in Fee.

1. **A** Man seised of lands devisable *leased it for life*, and after *devised the reversion to the plaintiff by name of all his lands, tenements, rents and services in W. which at the time of making his testament were and remained in his hands*; and per Cur. Reversion passes by this word *tenement*, and it was in manibus suis as a reversion may be; and it passes without attornment, per Cur. Br. Devise, pl. 7. cites 34 H. 6. 6.

Br. Brief de Inquirer, &c. pl. 14. cites 34 H. 6, 7. S. C. Le. 181. Arg. cites S. C. but adds a N. B. that devisor

had nothing but reversions.——S. C. cited by Jones J. Mar. 32. Trin. 15 Car.——S. C. cited by Powell J. Fortescue's Rep. 27. & Ibid. 229. by Treby Ch. J. in case of Monnington v. Davis, and his lordship there held, that the words (lands and tenements) would carry a reversionary estate, or a possibility after an estate tail.——By devise of all his inheritance or hereditaments a reversion passes. *Dyer's Reading of Statutes of Wills.* 26 H. 8. Cap. 8. 36.

2. A. leased his rent and great demesnes rendering rent, and did devise to B. *all his farm*; the devisee shall have all the rent and the reversion also. *Owen* 89. cites Pl. Com. 194.

• PL. C. 195. b. S. P. by Browne J. and Dyer

Ch. J. 1 Eliz. in case of Wrotesley v. Adams.

3. A. devised all his lands to his executors *for ten years, to perform his will and the will of his father* (in which divers legacies were given) to hold to them and every of them, and they *to take the profits for ten years to the use of his will, and then to sell the land and distribute the money* according to the said will. The testator was seised of land in fee in possession, and of a reversion after an estate for life. Gawdy J. held, that the reversion was not devised, because no profit could be taken of it, but all the other justices contra, for the intent was to perform the two wills and to pay debts, &c. and perhaps the estate in possession was not sufficient; but per Wray, if it had been *found that the land in possession was sufficient to perform the will* of both, it might perhaps have altered the case. *Cro. E.* 159. *Mich.* 31 & 32 *Eliz.* B. R. *Hawes v. Coney.*

Le 180. pl. 354. *How v. Conney.* S. C. & S. P. held accordingly by Clench and Wray, but Gawdy contra.——Mo. 341. pl. 462. *Hill.* 35 *Eliz.* C. B. the S. P. resolved accordingly in case of *Townsend*

v. Walley.——*Cro. Eliz.* 514. pl. 54. *Townsend v. Wale.* S. C. adjudged accordingly.——*Ow.* 155. *Townsend v. Whales.* S. C. held and judgment accordingly.——2 *And.* 59. pl. 44. S. C.——S. P. by Jones J. *Lat.* 136, 137. cites it as ruled *Mich.* 38 & 39 *Eliz.* Rot. 1247. in the case of *Townsend v. Hall* [but seems to be the S. C. of *Townsend v. Wall*, &c.]

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4. A. devised that his wife should have the occupation of *Black-Acre till Michaelmas next, paying 40 s. to N. his son*, and after devised all his lands, tenements, and hereditaments (except the land before specified and given to his wife) to N. my son in tail. By the exception of the land before specified and given, nothing but that passes to N. although the estate of the wife had been but for one day, but it had been otherwise, if he had said, *except the estate before*

fore specified and given; for then the *reversion* should have passed. Per Popham, if the devisor had lived till after Michaelmas, yet Black-Acre should not have passed to N. because devisor's intent appears to the contrary, though the wife had not any interest in Black-Acre. Noy 13. Trin. 1 Jac. B. R. Stockwood v. Sare.

5. A. seised of a moiety of lands in possession, and of another moiety in reversion expectant on the life of his father and mother, made a will thus; *my wife shall have to her use, &c. all that my living which I now occupy, so long as she keep my name till my son be 21. and that then she shall have the thirds of all my living.* Item, *I will, that my son shall have all my lands, &c.* The wife married, and the father and mother died before the son's age of 21. Adjudged that the words (the thirds of all my living) extend to the *reversion* as well as possession, and this devise is not controlled by the words subsequent of the devise to his son, and that though she determined her first estate by marriage, yet that destroys not the subsequent devise. Cro. J. 649. pl. 18. Mich. 20 Jac. B. R. Rowland v. Doughty.

8 Mod.

125. S. C.

cited in case

of Good-

right v.

Opy. —

cited 3 Mod.

228. in case

of Hyly v. Hyly. —

S. C. cited per Holt Ch. J.

6 Mod. 111. in the Countess of Bridgewater's

case. — S. C. cited 2 Vent. 286. — S. C. cited Fortescue's Rep. 227. by Nevil J. & ibid.

229. by Treby Ch. J. Hill. 7 W. 3. in the case of Monnington v. Davis. — S. C. cited by Ld.

Ch. B. Assistant to the Ld. Chancellor. 3 Wms's Rep. 63. and said he looked on that case to have

been the first case of this nature which had been adjudged, and is in All. 28. — Ibid. at the

bottom of the page is mentioned a remark of the reporter, that in the case of Ivy v. Ivy, heard at

the Rolls Trin. 1731. this case of Wheeler v. Walrond being cited, his honour sent for the record,

from whence it appeared that it was found by special verdict, that unless the reversion in fee

passed by the will there would not be sufficient to pay the testator's debts; which reason is not

taken notice of in the book.

6. A. seised of the manor of D. and other lands, devised the manor to B. for six years, and devised part of other lands to C. in fee, and then devised the *rest of all his lands to J. S. and the heirs of his body.* It was held, that by the word (rest) the reversion of the manor devised for years did pass. All. 28. Mich. 23 Car. B. R. Wheeler v. Walrond.

Saund. 180.

S. C. ad-

judged, and

judgment

affirmed in

the Exche-

quer & Chamber. — S. C. cited by Ld. Chancellor. 2 Vern. R. 623. and the case of Lid-

cott v. Willows. — 3 Wms's Rep. 64. Trin. 1730. Ld. Ch. B. assistant to the Ld. Chan-

cancellor cited S. C. and that it was agreeable to the case of Lidcott v. Willows, and the judgment

in which case was reversed in writ of error.

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Comb. 93.

S. C. —

This case

denied to be

law by the

Ld. Chief

Baron.

Gibb. 152.

Mich. 4

Geo. 2. in

7. A. devised to B. *a house for one year, and to C. lands for life* and then devised *all his lands not settled or devised to D.* and his heirs. Adjudged that the reversion of both well passed. 1 Lev. 212. Pasch. 19 Car. 2. Br. Cook v. Gerard.

8. A. devised lands to B. in tail special, and so of other land to C. and other land to D. and adds, *all the rest and remaining part of my estate I devise to B. C. and D. equally to be divided among them, that only excepted which I have given to B. C. and D. and to the heirs males of their bodies,* and made them executors, and after adds, if either of my executors die without issue, his part shall go to the survivors and their heirs equally; D. died without issue. It was adjudged that the exception extended not only to the estates

estates tail but to the reversion in fee also, and so that the reversion in fee did not pass. 3 Mod. 228. Trin. 4 Jac. 2. B. R. Hyley v. Hyley.

3 Wms's Rep. 63. in S. C. Ld. Ch. B. cited S. C. and said, that it might well be said not to be law, it being adjudged the same way, and much about the same time with the case of Lidcott v. Willows; and as the judgment of this latter was reversed upon error, so also would the former have been, had error been brought thereof.

9. W. S. seised of several manors in St. Martin's and other parishes, devises his houses in the other parishes to divers charitable uses, and then devises to E. H. and M. his wife the messuage in question for their lives, and then the better to enable his wife to pay his legacies, he devises all his messuages and hereditaments whatsoever in the kingdom of England not above disposed of to her and her assigns for ever. E. H. and his wife M. both die; the testator leaves sufficient to pay his legacies, without the said reversion, &c. Held that the words here carried the reversion to the wife as an hereditament not disposed of. 2 Vent. 285, 286. Mich. 1 W. & M. in Cam. Scacc. and so reversed a judgment in B. R. Willows v. Lidcott.

3 Wms's Rep. 64. Trin. 1730. cited by the Ld. Ch. B. Assistant to the Ld. Chancellor, that the judgment in the case of Lydcott v. Willows was reversed in error.

10. A. settles land to the use of himself for life, then to B. his eldest son for life, with a proviso to preserve the contingent remainders, and then to the first, &c. sons of B. in tail male, and so to C. remainder to the right heirs of B. After A's death, B. having a son and a daughter, by will devised all his lands, tenements and hereditaments to M. his daughter in fee, in case his son should die without issue; B. died, and the son died without issue: and Holt Ch. J. who delivered the opinion of the court, said, that though B. had only a dry reversion in fee, yet that by the words all his lands tenements and hereditaments, such reversion would pass by the generality of the words. Skin. 631. Hill. 7 W. 3. B. R. Dalby v. Champernoon.

11. J. S. seised in fee, devised Black-Acre to A. for life, and devised to B. all his lands, not before devised, to be sold, and the money to be divided between his younger children. The question was, whether the reversion of Black-Acre passed by the devise of all his lands before devised; and it having been referred to the judges of C. B. they unanimously agreed and certified, that the reversion was well devised; and it was decreed accordingly. 2 Vern. 461. pl. 421. Hill. 1703. Rook v. Rook.

the judges of C. B. certified accordingly. — Equ. Abr. 210. pl. 17. S. C.

12. A. devised an estate to B. his heir at law, for life, and after other legacies devised all other his personal estate, lands, tenements, hereditaments, not before devised, to C. Per Cur. the reversion of the estate* devised to B. well passed. 2 Vern. R. 559. 560. pl. 507. Trin. 1706. at the end of the case of Kingman v. Kingman, but seems not to belong to that case. tells real and personal to his wife, whom he makes sole executrix, this carries only personal estate. Hill. 1712. Abr. Equ. Cases 211. Marchant v. Twissden.

case of
Chester v.
Chester in
Canc. —

3 Mod. 229.
Lydcott v.
Willows.
S. C. ac-
cordingly.
—Carth.
50, S. C. ac-
cordingly.
S. C. cited
by Treby
Ch. J. For-
tescue's
Rep. 229.
Hill. 7 W.
3. C. B. —

Chan. Proc.
202. pl.
163. S. C.
held and de-
creed ac-
cordingly.
—Freem.
Rep. 519.
pl. 694. S.
C. and the
opinion of
S. C.

If after pecuniary legacies the testator devises all the rest and residue of his estate, charitable

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If there had been any lands or shares of land lying out of the places mentioned in the will to satisfy the word (elsewhere) it might make a difference. Ibid.—3 Wms's Rep. 96. S. C. decreed by the unanimous opinion of the Ld. Chancellor, Ld. Ch. J. Ld. Ch. B. and Mr. Justice Price.

13. A. having land in D. and in S. conveys *the land in D. to B. in tail, remainder to his own right heirs*; then he devised *all his lands in S. and elsewhere not formerly settled*, to C. and his heirs for ever. Decreed that by this the reversion passes of the land in D. Gibb. 150. Mich. 4 Geo. 2. in Canc. Chester v. Chester.

S. C. Gibb. 288. Pasch. 4 Geo. 2. reports, that judgment was given for the younger children against the heir at law the last Trin. term per tot. Cur. and error brought in B. R.

14. A. seised of the reversion in fee of houses of the yearly value of 264l. let out on building leases at a ground rent of 29l. a year; A. had issue B. his eldest son, and C. D. and E. younger children, and devised to C. *so much a year of 29l. a year ground-rent in or near Red-Lion-Square to him and his heirs and assigns for ever*; and devised to D. and to E. *in the very same words*, which in all amounted to the 29l. and devised to B. whom he called *his undutiful son*, 5l. a year out of some lottery tickets. It was argued whether this should carry the inheritance or not. The court thought it a new and difficult case, and so it stood over to the next term. Gibb. 70. Trin. 2 and 3 Geo. 2. C. B. Mandy v. Mandy.

(K. b) What Lands and other Things pass by what Words.

Words wrongly or imperfectly describing the Thing or Place.

Cro. E. 19. pl. 7. Higham v. Baker. S. C. adjudged that by the second limitation the wife shall have the whole.—Mo. 123. pl. 269. Anon. but S. C. reports it according to Leonard.—3 Le. 130. pl. 183. S. C. in totidem verbis.—Godh. 36, 17. pl. 23. S. C. held accordingly.—S. C. cited 4 Mod. 142. Arg.

1. A. Seised of 100 acres of land called *Jacks*, usually occupied with a house, let the said house and 40 acres of the said 100 acres to B. for life, and made his will and devised the said house and all his land called *Jacks*, then in the occupation of B. to his wife for life, and after her decease remainder thereof, and of all his other lands belonging to *Jacks*, to his second son; the wife shall have only the house and forty acres, but the devise to the second son extends to the other 60 acres, by reason of the words (belonging to *Jacks*.) 2 Le. 226. pl. 287. Trin. 25 Eliz. C. B. Higham's case.

2. If a man has land called *the manor of Dale*, and he deviseth his manor of Dale to J. S. the land shall pass, though it be not a manor; per Anderson Ch. J. Godh. 17. in pl. 23. Pasch. 25 Eliz. C. B.

3. The

3. The devisor being *seised of a fee farm rent issuing out of the manor of F. and of no other land whatsoever, devised his manor of F. to J. S.* And it was there held, that the devise of the manor of F. were words * in a will sufficient to pass the fee farm rent issuing out of that manor; for the devisor being *seised of that rent, and nothing else in that manor*, it was plain that the testator meant the rent, and could mean nothing else; so that otherwise the will must have been intirely void. 3 Le. 165. pl. 218. Hill. 29 Eliz. C. B. Inchly v. Robinson.

2 Le. 41. pl. 57. S. C. in totidem verbis. — 4 Le. 73. pl. 142. Ld. Mountjoy v. Barker. S. C. the reporter says that Walmsley

told him, that the opinion of the court was as here, and would have given judgment accordingly, had it not been discontinued — Ow. 88. Jelsey v. Robinson. S. C. the court agreed that the rent without doubt might be severed.

4. A. purchased land of B. but before any conveyance made by B. to A. A. sold the land to C. who paid part of his money to B. and part to A. and then B. made a conveyance to C. of the land. C. by will gave to D. all his land in S. *which he purchased of B.* whereas he purchased it of A. Adjudged that the lands passed. And. 188. pl. 224. Hill. 30 Eliz. Thompson v. Thornton.

2 Le. 129. pl. 165. Thorp v. Tomlin. S. C. and all the court held the devise

good. — S. C. cited Cro. E. 358. by the name of Chapman v. Thomson.

5. By a will things of one nature may pass by words which are proper to pass things of another nature. Arg. Sty. 279. cites 35 Eliz. in B. R. Robinson's case.

6. A seised of lands called *Heseland*, which extended into the parish of B. and C. made his will thus; as concerning the disposition of all my lands, &c. he devised all those his lands lying in C. called *Heselands, to his wife for life*, and after her decease that it should remain to John his son and his heirs. And after diverse other clauses, he wills that if John die without issue, *Heselands shall remain to his daughters in fee.* The daughters should take only so much of Heselands as is in C. and no part of what lies in B. Though Fenner and Williams J. held that the daughters should take as well that in B. as in C. But it was adjudged afterwards, that the said B. did not pass to the daughters, and so a judgment in C. B. reversed. Cro. J. 21. pl. 2. Hill. 1 Jac. B. R. Tuttesham v. Roberts.

Cro. E. 674. pl. 1. Trin. 41 Eliz. B. R. Wooden v. Osborne. S. P. exactly in B. R. and seems to be the very S. C. only it mentions John the devisee to be the testator's youngest

son, and that the devise to John was precedent to that to the wife, and that if John dies without issue, the wife should have Heselands; and resolved that the wife should have only that which was in C. because there was no more devised to John. But Popham said, if the devise had been to the eldest son, and that if he died without issue, that the wife should have Heselands; there peradventure she should have all; because the eldest son had all, viz. the one part by devise, and the other part by descent, and she should have all which he had; and judgment accordingly. — 3 Le. 77. pl. 135. Mich. 21 Eliz. Anon. but S. C. in C. B. says it was the opinion of Anderson and Periam, that all Heseland should not pass by the devise to his wife [to whom it was devised (according to the report) in the first place] but only that which was in C.

7. The testator devised *all the profits of his houses and lands lying in the parish of Billing*, and in a street there, called Brook's-street, to his wife for life, when in truth there was no such parish as Billing, but the land supposed to be devised laid in Billing-street. The will was held by all the court to be good. Brownl. 131. Trin. 3 Jac. Pacy v. Knolls.

8. I give and bequeath to A. 100 sheep and 10 bullocks, and 10 l. payable quarterly out of my lands; this passes only 100 sheep and 10 bullocks

bullocks in the whole and the second (*and*) dis-joins the beasts from the rent, and shall be taken generally, without any reference to it. 8 Rep. 84. a. 85. b. Trin. 7 Jac. Sir Richard Pexhall's case.

a Bulst.
176. Hill.
11 Jac. S.
C. adjudged
per 3 justices
against
Croke J.

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4 Mod. 142.
Arg. cites
S. C.

9. A. having two several moieties of lands by several purchases in Kent and in Essex, among other things devised, says, *and as to my moieties, I devise all my moieties in Kent unto B. and makes no mention of the moiety in Essex.* Adjudged that both moieties passed. Bulst. 117. Pasch. 9 Jac. Mirril v. Nichols.

10. If one by will devise *his land in his own possession*, and he has land in his own possession solely, and also other land in his possession but in common with another, the whole shall pass by the will; per two justices. Bulst. 117. Pasch. 9 Jac. in case of Mirril v. Nichols.

11. A. has two houses adjoining, viz. the Swan and the Red Lyon, and A. has the Swan in his own possession, and occupies a parlour, (*which in truth belongs to the Red Lyon*) with the Swan-house, and then leaseeth the Red Lyon House, and then by will devised his house called the Swan. The room of the Red Lyon, which A. occupied with the Swan passes by this devise, though of right it belonged to the Red Lyon House. Arg. Godb. 352. pl. 447. Trin. 21 Jac.

12. A. seised of a house called the White Swan in Oldstreet, London, and of a garden thereunto belonging; made a will thus, *I devise the house or tenement wherein W. N. dwells, called the White Swan in Oldstreet to J. D. for ever. It was found that W. N. at the time of the deviser's death inhabited the entry of the said house, and three upper rooms therein, and that J. G. held the garden, and other places in the said house, and some others, other rooms.* Resolved, that all the house passed to the devisee, for the devise being, that house or tenement, and the conclusion being called, the White Swan, both of them import the whole house, and the words (*wherein W. N. dwells*) does not abridge or alter that devise, and the house being named by a particular name, although W. N. never dwelled in it passes by the devise. By three justices, contra Hide Ch. J. Cro. C. 129. pl. 4. Mich. 4 Car. B. R. Chamberlain v. Turner.

13. *But if the house had not been named by the particular name of the White Swan, and he had devised the house in the occupation of W. N. there perhaps it should not extend to more than was in the occupation of W. N. and not to that which was in the occupation of others, according to the case of Andrew Ognell, Coke Lib. 4. fol. 48. 50. Cro. C. 130. the S. C.*

14. A man hath two closes called Spring-closes, but originally were but one close, and by his will he devised a close called Spring-close, and it was held by the judge that only one of these closes should pass, but the jury found for both to pass against the opinion of the court, and the judge did not rebuke them for it. Clayt. 104. pl. 175. Assise Apr. 8 Car. Whitfield J. Leake's case.

15. I devise *all my farm, and all my lands in the occupation of K. in the manor of R. and N. to J. S. No part of the farm was in R.* Per cur. this passes lands in the possession of K. in the parish of N. though

though they are not parcel of the manors of R. or N. 3 Keb. 637. pl. 40. Pasch. 28 Car. 2. B. R. Parker v. Ayres.

16. Devise of a charity by A. to the parish of B. in the county of C. There was no such parish in the county of C. but in the county of D. adjoining there was; the court thought that since there was such a parish in the county of D. the *testator must mean the parish in the county of D.* because it appeared he was *born there*, and that both A. and his parents lived and died in that parish. Fin. Rep. 395. Mich. 30 Car. 2. Per Owen. Langenew parish in Denbighshire v. Bean, & al'.

17. The testator having two houses, one called the Upper House, and the other called the Lower House, devised *all his tenements for the payment of his debts, until his grandson should come of age, and afterwards he devised all his said tenements, viz. two parts of the Lower House for raising 200 l. &c. the remainder to his grandson and his heirs*; the question was, whether the viz. and the clause which immediately followed it, did restrain this devise to the lower house only, or whether the whole passed to the grandson by those words which went before, viz. All his said tenements. The court held that the adverb, viz. was distributive here, and shewed what the devisee should have; and so the plaintiff had judgment nisi. 4 Mod. 140. Trin. 4 W. & M. Bagnall v. Abnett.

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18. A devise was of a rent charge of 100 l. per ann. to A. for life, to be issuing out of the rents and profits of certain lands, which were worth but 50 l. a year with power of distress, and devised the same lands charged with the said annuity to B. and his heirs. A. the devisee enters into the land, and by will devises to C. the arrears of the said rent-charge. C. the devisee shall hold over, because the 100 l. a year was to be satisfied before B. should have any thing, and by the devise the lands are charged in B's hands by the said words; for it could not be charged before. Chan. Prec. 122. pl. 106. Mich. 1700. Foster v. Foster.

19. One seized in fee of five messuages by his will devised two of them to his wife for life, remainder to his two daughters in fee; and devised the third to the wife and her heirs, the fourth he devised to the wife and her heirs she paying his legacies, in case his goods and chattles did not answer them all. And if he did not make provision for the payment of his legacies in her life-time, that it should be lawful for the legatee after her death to sell the said messuage, to satisfy the legacies out of the value thereof. And then follows this, on which the doubt arises, (*and all the overplus of my estate to be at my wife's disposal, and make her my executrix,*) and per Trevor, Powell and Blincow judges, the second house did not pass. 12 Mod. 592, 593. Mich. 13 W. 3. Shaw v. Bull.

20. A. by one settlement is tenant in tail after possibility, &c. of Black-acre, remainder in fee to trustees in trust for A. and his heirs. And by another settlement is tenant for life, remainder to his first, &c. sons, remainder to trustees in fee in trust for the right heirs of B. whose heir A. is of White-acre. And is tenant in tail, remainder to the right heirs of his father of Green-acre. A. has no issue, and by his will devises to J. S. all his lands, tenements, and

3 Chan. Rep. 169. S. C. Decreed, and the decree affirmed in the House of Lords. Equ. Abr.

210. pl. 18. and hereditaments out of settlement. Decreed per Cowper C. assisted by Trevor Ch. J. and Tracy J. that all the lands so settled passed by this devise. And that the words out of settlement, as this case stands, are of no effect. 2 Vern. 623. pl. 557. Mich. 1708. Sir Litton Strode v. Lady Russell, Falkland, &c. affirmed in the House of Lords, and on which case the court laid great stress in the principal case there. Trin. 1720.

21. Properly *lands under settlement* is where the whole inheritance is settled and disposed of, as if the testator had been tenant in tail, remainder in fee to another; there the whole had been under settlement, though he might have barred the remainder by a common recovery; so if the whole inheritance had been settled, but there had been a *power of revocation*, though the testator might have revoked, it should not have passed by the words (out of settlement,) because the whole is properly under settlement, though liable to be revoked. Per Cowper C. 2 Vern. 623. in case of Strode v. Lady Russell, Falkland, &c.

22. *Lands settled with power of revocation will not pass by devise of lands not now in settlement.* 2 Vern. 623. pl. 557. Mich. 1708. Litton, alias Strode v. Lady Russell and Falkland.

[280] 23. One devised *all his freehold houses in A. to J. S. and his heirs*, and in fact the testator had no freehold houses there, but leasehold he had. Decreed per justice Tracy in the absence of Lord Chancellor, that in such case the leasehold passes being by a will; though they would not in a grant, and that the word (freehold) shall be rejected rather than the will should be void. And he said that the bill was proper in equity, since the leasehold houses (being chattels) could not pass by the will without the assent of the executor, which assent he was compellable to give in equity. Wms's Rep. 286. Mich. 1715. Day v. Trigg.

24. Devise of *my strong box and all that is therein*, and *all my chests and cabinets, and all that is therein* to my daughter E. There was a frame fixed to the strong box, in which were drawers that contained bank notes and other things of value, and the frame was so fixed with screws to the box, that it could not be separated without opening the box, yet decreed that what was in the frame should not pass, but the frame with the consent of the executor was given to the said E. Upon appeal to the House of Lords this matter was compromised. March 15. MS. Tab. 1744. Ld. Paget v. Duke of Bridgewater.

25. By a devise of *all my household stuff, and materials of household goods* that were in a workhouse 70 miles distance from the testator's house, for employing sick and wounded seamen, do not pass. MS. Tab. Feb. 1, 1726. Pratt v. Jackson.

2 Wms's Rep. 302. pl. 85. Mich. 1725. S. C. but that is as to a marriage agreement, whereby the wife was not to claim any thing out of the husband's real or personal estate, provided that it should not extend to what he should or might leave her by will, nor to all or any the goods, utensils or household stuff, &c. of him at his death, all which she was to have and enjoy. Lord Chancellor said he would take the meaning to be as large as the words, and so decreed her the beds, sheets, and other furniture used in the workhouse, [which was a hospital in Portsmouth.] But upon appeal to the House of Lords, this decree was reversed Feb. 1726,

(K. b. 2) Uncertain Description. What Things pass by what Words. Also,

1. **O**NE devises all his freehold lands in *D.* to his wife during her life; Item, I give to her for life the lands which I hold of *G. T.* Item, I give to her for life all the lands which I purchased of *J. S.* Item, I give, grant and bequeath my said lands to *E.* my son and his heirs for ever; not only the lands purchased of *J. S.* pass to the son, but all the other by this devise. Adjudged upon a special verdict. *Skin. 130. pl. 5. Mich. 35 Car. 2. B. R. Barrow v. Gameath.*

(L. b) What passes.

Where Lands lie in two several Vill.

1. **A** Man seized of land in a town, and in two hamlets of the town, devised all his lands in the town, and in one of the hamlets, naming it. Diverse justices held, that nothing of the land in the other hamlet passed, because of the intent; but *Brown* e contra, because the principal vill comprehended all the hamlets. *D. 261. b. pl. 27. Pasch. 9 Eliz. Anon.*

*S. C. cited 2 Roll. Rep. 275.—
S. C. cited 4 Mod. 142.
Arg.*

2. One devises all his lands in *A. B. and C. and elsewhere.* [281] The testator has lands in *A. B. and C.* and lands of much greater value in another county; the lands in the other county shall pass by the word elsewhere, 3 *Wms's Rep. 61. Trin. 1730. Chester v. Chester.*

*Gibb. 152.
S. C. and S. P. per Cur.*

(M. b) What passes by Interfering Words,

1. **D**EVICE to three, provided that one shall have all the profits; it was construed, that two should be seized to the use of the third. For a devise of the profit is a devise of the land; and if a man grant land, reserving the profit, it is a void reservation; per *Doderidge J. Roll. Rep. 320. cites 30 H. 6. Br. Estates 74. and F. Devise 22.*

But where the devise was that one should have all during his life, it was held, that this

was as to the perception of the profits only. Yelv. 183. in case of Aylet v. Choppin. Cites 30 H. 6. Devise 12.

2. *A. devised to his son a manor in tail, and after by the same will be devised a third part of the same lands to another of his sons; they by this are jointenants, per Brown and Dyer. 3 Le. 11. pl. 27. Mich. 8 Eliz. C. B. Anon.*

Yelv. 210.
by Wil-
dams J.—
Herne J. in
the case of
Byliff v.

3. If a man in one part of his will *devise* his lands to A. in fee, and in another part of his will devised the same to B. in fee, they are *jointenants*, per Dyer and Brown J. 3 Le. 11 pl. 27. Mich. 8 Eliz. C. B. Anon.

Chopley. Bulst. 42. per Fenner J. this is a good devise to B. But per Williams J. it is altogether void for the uncertainty.—B. shall take, and not A. 2. Roll. Rep. 423. the serjeant's case.—Jenk. 256. pl. 50.—Per Anderson it is good to B. but Periam J. contra. Ow. 84.—S. P. Arg. 10. Mod. 521.—3 Bulst. 105.—Cro. J. 49.—Per Tanfield Ch. B. Lane 118.—Roll. Rep. 310.—Cro. E. 9.—(See Jointenant (K) S. C.)

Cited 2
Roll. Rep.
425. in the
Serjeant's
case.—
Cited per

4. A. devised the fee simple of his land to his wife, and after her death to W. his son, who was his heir apparent; this is a devise for life, the remainder to the son for life, and the remainder to the wife in fee. D. 357. a. pl. 44. Pasch. 19 Eliz. Chick's case.

Croke. 2 Bulst. 127.—Cited Arg. Mo. 362.—In all which books it is cited that the wife had the fee.—But And. 51. pl. 125. Baker v. Raymond. S. C. says it was adjudged that the son had the fee.—Bendl. 300. pl. 293. Baker v. Raymond. S. C. adjudged that the wife had only an estate for life, the remainder in fee to W. the son.

5. Devise of land to B. in fee, and after there is a devise of rent to D. out of the same land; this shall be construed first a devise of the rent, and then of the land. 3 Bulst. 105. cites Pl. C. 541. Hill. 21 Eliz. Paramour v. Yardly.

6. A. seised in fee of the manor of M. extending into M. and the town of N. and also of other lands in N. by his will devises the manor of M. to B. his eldest son and heir in tail, and his lands in N. to C. his younger son, &c. per three justices C. shall have that part of the manor of M. which lies in the town of N. 2 Le. 190. pl. 239. Mich. 32 Eliz. C. B. Sir Ant. Dennis's case.

7. A. devised lands in fee to his son, and many other lands in tail, and after says, *I will that if my son die without issue within age, that the lands in fee shall go to H. Item, I will that the other lands in tail shall go to F. S. and says not in the second item, if the son dies without issue within age.* Adjudged that the second item should be without condition. Godb. 146. pl. 185. 3 Jac. B. R. Pinder's Case.

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S. P. per
Ld. C.
Maccles-
field. 2
Wms's

8. A. devised all his land in England to B. and then adds, *Item, I give my land in F. to C.* This item is an explanation of his intent, that B. shall have all except the land in F. which he appointed to C. And they are not jointenants. Yelv. 209. Mich. 9 Jac. B. R. Wallop v. Darby.

Rep. 8 Pasch. 1722. in case of Hill v. Filkin.—A. seised of Black Acre and of a messuage, devised all his lands and tenements to C. in fee; and afterwards in the same will he devised his house called the Swan, now in the tenure of J. S. to D. for ever; resolved that D. had a fee in the house. D. 357. a. Marg. pl. 44. cites Pasch. 4 Car. B. R. Chamberlain v. Tanner.—Cro. C. 149. pl. 4. Chamberlain v. Turner. S. C.—Jo. 195. pl. 7. S. C. adjudged per tot. Cur.—A man devises by his testament to his daughter J. all his land in D. habund. sibi & hered. de corpore suo legitime proc. And by the same testament he devises to his daughter A. all his land in the tenure of J. S. in the county of Hereford. Whereas in truth D. was in the county of Hereford, and parcel of the lands were in the tenure of J. S. Whether J. shall have the lands in D. in the tenure of J. S. by the first words; or A. shall have them by the last words. Harvey said, the testator had given them by his first words to J. wherefore he cannot revoke his gift, and give it afterwards to another daughter. But all the justices were of the contrary opinion. Het. 77. Hill. 3 Car. in C. B. Whiddon's case.

9. Devise of *all his lands* in England to A. and his heirs, and *if he die without heirs of his body*, then *his lands in M. shall be to B. in tail*. Item, *I give my land in N. to C. in fee*. Devisor dies; C. dies; B. survives, and dies without issue. The heir of C. shall have the land; but by the better opinion of the court, C. does not take but by way of remainder after the death of B. without issue. Yelv. 209. Mich. 9 Jac. B. R. Wallop v. Darby.

Adjudged accordingly that it is no countermand; for the item shall be construed that if A. died with-

out issue, the land should remain as the devise was to B. and the limitation to A. is to be construed to A. and the heirs of his body, and not a fee, and so all the clauses of the will stand together. Cro J. 290. pl. 7. S. C. by the name of Brown v. Jervis. S. C. cited 4 Mod. 69. per Cur. And Ibid. 317 Arg.

10. A. has lands in M. or N. and no where else, and devised all his lands in M. to B. and all his lands in N. and elsewhere to C. The word elsewhere is void. Hob. 65. pl. 68. Trin. 12 Jac. C. B. Green v. Armsted.

11. A. possessed of a term, devised it to B. *if living at his death, otherwise to C. whom A. made executor*, with a proviso that *if B. be living at A's death, then C. to account to B. for a moiety of the profit of the term at 21 or marriage, and C. to retain the other moiety*. A. died. Afterwards B. died before 21 or marriage; the term by the assent of judges was decreed to C. Chan. R. 80. 10 Car. 1. Revet v. Row.

12. Sir S. B. devised all the coppice and wood-grounds, and all and singular the premises, and all woods and under-woods (except timber-trees) to his wife for life, and after her death, limited the same, with the timber-trees, to trustees, that they for two years should pay the profits of the premises to the plaintiff, and they to bestow the same in building the college, and after limited the reversion and fee simple of the premises to the plaintiff and their successors for ever (the said woods, under-woods and timber-trees excepted.) The question is, as the exception is made of the woods, under-woods and timber-trees, whether the soil is not excepted also from the plaintiff? The court is clear of opinion, that the intent of Sir S. B. was, that the whole, as well the soil as the said woods, under-woods and timber-trees, do pass by the said will. Chan. Rep. 134, 135. 15 Car. 1. Magdalen College, Oxon. v. Crook.

13. Devise of land to A. in fee, and after by the same will devised a third part to B. for life, or in tail, this last devise to B. don't make void all to A. But B. has estate in possession and A. in remainder. Per Bridgman Ch. J. in delivering the opinion of the court. Cart. 174. Hill. 18 & 19 Car. 2. C. B. in case of Rundall v. Ely.

14. Devise to A. in tail, remainder to B. remainder to C. &c. [283] and after the devisor by express words devises an estate in possession to B. This is a revocation of all the remainders, for the remainder not determining by devise, but by cesser and interposition of another estate, upon which the remainder did not depend, the remainder could not stand; but in a conveyance of uses there may be interposition of other estates, and the remainder stand good, because this remainder depends and hangs on the first root. But in a will the remainder settled must follow the rule of law, for

after the devise of the devisor, there is not root nor spring then. Per Bridgman Ch. J. Cart. 175. Hill. 18 & 19 Car. 2. C. B. in case of Rundall v. Ely.

15. A man hath *issue two sons, T. his eldest and R. his youngest son. T. hath issue J. and R. hath issue M. a daughter.* The father devised lands to his son T. for life, and afterwards to his grandson J. and the heirs males of his body; and if he die without issue-male, then to his grand-daughter M. in tail, and charged it with some payments, in which will there was this proviso; viz. *If my son R. should have a son by his now wife E. then all his lands should go to such first son and his heirs, he paying as M. should have done.* Afterwards a son was born, and the question was, whether the estate limited to T. the eldest son was thereby defeated; and the court were all clear of opinion, that this proviso did only extend to the case of M's being intitled, and had no influence upon the first case limited to the eldest son. 2 Mod. 293. Hill. 29 & 30 Car. 2. in C. B. Evered v. Hone.

16. Devise of a term to A. and B. *in the will as jointenants, and in the latter part of the will as tenants in common*, there shall be no survivor. 2 Chan. cases, 64. Trin. 33 Car. 2. Draper's case.

17. A. by will devised 1300l. to B. provided, *if B. died before twenty-one without issue*, then the 1300l. to go to C. and provided *if B. marry before twenty-one without consent of M.* then to go to D. B. married without consent of M. the question was who should have this 1300l. if she should die without issue before twenty-one; per Master of the Rolls, the proviso of forfeiture by marriage without consent of M. cannot take place, or have any force till B. shall be twenty-one, that they are *consistent provisos* and ought to be so construed; and decreed, that if B. die before twenty-one without issue, that C. should have the benefit of the first proviso. 2 Vern. 86. pl. 83. Mich. 1688. Pawlet & Ux. v. Dogget.

18. If a man devise an annuity to a child *issuing out of certain lands*, and by the same will he *devises the same lands for payment of debts and legacies*; the devise of the annuity is a subsisting charge on the lands and shall be good; held so. N. Ch. R. 102. Pasch. 1692, in Powell's case.

19. A. seized of gavelkind lands, and having two brothers B. and C. (B. had issue two sons H. and B. and issue two daughters M. and N. and C. had issue H. and H. had issue S.) devised the lands to H. the son of B. *if he lived till twenty-one*, and then his wife to have the house, &c. and if H. die before twenty-one then to the next son of B. and if B. have no son, then to H. the son of C. and his heirs, and if H. die before twenty-one and my wife be dead then to the next heir last named, as it shall fall out. H. son of B. died before twenty-one without issue, but B. his brother entered and died, leaving two daughters M. and N. The grand question was, on the words, *if B. have no son then to H. the son of C. and his heirs*, it was admitted that by these words H. the son of C. took nothing, but whether the following words, viz. *If H. die before twenty-one and his wife be dead, then to my next heir last named as it* shall

shall fall out, and Holt Ch. J. demanded of Levinz of counsel for the heirs of C. that if the words *and if H. die before twenty-one*, should be *applied to H. son of B.* and the words *then to the next heir last named* should be construed any other son of B. if B. had another son, *otherwise as it shall fall out to H. son of C.* if he shall be next heir, so that (as it shall fall out) shall be *applied to the son of B.* if he shall have another son who shall be next heir (for it is not found by the verdict that their fathers were living) otherwise to H. son of C. if he shall be next heir. For the words (as it shall fall out) are considerable and if it be so that the words *next heir* should be applied to B. it will give him an *estate in fee*, and Holt Ch. J. said, that this seemed to be the meaning and intention of the deviser, and *if H. die before twenty-one* to be but a *repetition of what he had said before*. But curia advisare vult. Skin. 385. 562. Mich. 6 W. & M. in B. R. Bevison v. Husley.

20. A. had a son and two daughters M. and N. and devised (in case his son should die without issue) *all his lands except Black-acre, Green-acre, and White-acre to M. in fee*, and he devised *Black-acre, White-acre, and Green-acre to N. in fee*, and then he recites, that, *whereas he was seized of other lands, &c.* and in the end of the will he takes notice of a request of his father's that *Black-acre should go for want of issue-male of A. and B. his brother, to D. his cousin*, and that in obedience to the will of his father, he is desirous that it be observed, and requests B. his brother to act accordingly, and after dies, and John his son and B. dies without issue. And Holt Ch. J. who delivered the resolution of the court, said, that when it after appears by the special words, that such general words ought not to extend to all his lands, tenements, and hereditaments, there an *exposition ought to be made according to the special words*, according to the rule in ALTHAM's case, 8 Rep. for otherwise the special words would be rejected; and therefore here, the words so far as there are *other lands, &c.* ought to qualify the generality of these general words and other ought to be referred, not to the lands before, but ought to be understood of the words not mentioned before; and therefore the words (all his lands) ought to be restrained, according to the special words, and not construed according to the generality of them, when he said there are other lands which could not be comprised before, for then they could not be others; and concluded that by these general words Black-acre did not pass but descended equally to M. and N. and gave judgment accordingly for the defendant. Skin. 631. Hill. 7 W. 3. B. R. Dalby v. Champnoon.

21. I give *all my personal estate to my wife, and to A. and B. 1000 l. a piece*, if they arrive at the age of twenty-one years, or marriage; A. was heir at law to the testator. Per cur. the devise to the wife must be so much thereof as was not disposed of by the will. For otherwise this will be inconsistent by devising 1000 l. to A. the heir at law, who would be intitled to his whole estate after the death of his wife, and therefore a devise of 1000 l. to be paid to A. out of testator's estate would be impertinent when

he was to have the whole estate himself. 9 Mod. 93. Pasch. 10 Geo. 1. in Canc. Burdet v. Young.

[285] 22. A. devised several *specifick* legacies to several persons and to each of his grandchildren *to be paid at their respective ages of twenty-one years*, or days of marriage, which should first happen. And by a subsequent clause appoints that all the legacies thereby devised *shall be paid within one year* after his decease; per cur. the subsequent clause in the will which seemingly contradicts the payment of the legacies to the grandchildren in point of time must be construed, so as it may not be repugnant to any former clause in the same will, and therefore that last clause must only relate to the other *specifick* legacies given to the other legatees, and not to the legacies devised to the grandchildren. 9 Mod. 154. Trin. 11 Geo. Adams v. Clerk.

23. A. having lands of inheritance in B. and C. and a mortgage in D. and lands extended in E. on a statute, makes his will and devised, all his credits and mortgages to his executors, and after devised all his messuages, lands, tenements, &c. and all his real estate whatsoever in B. C. D. and E. to R. W. and J. S. for their lives, and after their decease to their heirs, &c. King C. decreed, the mortgage and extended lands in D. and E. to the executors, and differs this case from the case in Cro. C. 292. Rose v. Bartlett. Where a man was seised of a term for years in A. and having no other land there, devised all his lands in A. it was adjudged that the term for years passed, for in that case Ld. Chancellor said, if the term had not passed the will had been intirely void, whereas here it stands well for part, and so affirmed a decree made at the Rolls. Gibb. 116, 117. Hill. 3 Geo. 2. in Canc. Davis v. Gibbs.

24. If the latter part is inconsistent with the former part, it supercedes and revokes it; per Reynolds Ch. B. and Comyns and Thompson. Gibb. 195. Hill. 4 Geo. 2. in the Exchequer, obiter.

(N. b) What passes an Interest and what an Authority. By the Word Until, &c. and of what Continuance.

3. C. cited by Bridgman Ch. J. Cart. 25. Trin. 17 Car. 2. C. B. in case of Courthope v. Heyman S. P. ——— Ch. Rep. 263. Gore v. Blake. ——— So it is if the words were, that if M. his wife think fit to bring up his children in learning and to find them meat, drink, and apparel, that then they shall have his land till his son comes to twenty-four; it is an interest. Cro. E. 252. pl. 21. Mich. 33 & 34 Eliz. B. R. Smith v. Havens.

Mo. 48. pl. 143. says if the

2. Devise of his lands to his wife *from year to year, till J. his son shall come to the age of twenty years*. By the death of J. the wife's

wife's estate is determined; but by Dyer if the words had been *till his son shall come or might come to the age of twenty years*, there notwithstanding his death the estate of the feme continues. Dal. 58. pl. 6. anno 6 Eliz. Anon.

words had been *till the son should or might come to twenty, &c.* then the

wife's estate had continued.

3. A devise that his wife should inhabit in one of his houses which he had for term of years during her life. Here the wife takes no interest in the term but only an occupation and usage, out of which the executors cannot eject her during her life. Per cur. præter Walsb. Ow. 33. Trin. 7 Eliz. Anon.

4. A. devised, that his lands should descend to his son, but he willed, that his wife should take the profits thereof, until the full age of his son, for his education and bringing up, and died; the wife married another husband, * and died before the full age of the son; and it was the opinion of Wray and Southcote justices, that the second husband should not have the profits of the lands until the full age of the son, for nothing is devised to the wife but a confidence, and she is as guardian or bailiff for to help the infant, which by her death is determined, and the same confidence cannot be transferred to the husband; but contrary if he had devised *the profits of the land unto his wife until the age of the infant to bring him up and educate him*, for that is a devise of the land itself. 2 Le. 221. pl. 280. Pasch. 16 Eliz. B. R. Anon.

3 Le 78. pl. 118. Mich. 21 Eliz. B. R. Anon. but S. C. in to-tidem ver-bis; but at the conclu-sion Wray said; that the same amounted to a devise of the land, and so a chattel in the wife,

which should accrue to the husband. —S. C. cited by Bridgman Ch. J. Cart. 26. Trin. 17 Car. 2. C. B. accordingly.

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5. A. having B. a son nine years old, devised his lands to his executors for payment of his debts, until B. shall be 21, remainder over to B. Though B. dies the term continues in the executors till such time as B. had he lived, would have been 21. 3 Rep. 21. Hill. 29 Eliz. Boraston's case.

S. C. per Coke Ch. J. but says it would be otherwise in case of a grant. 2. Bulst. 131.

6. A. devised lands to B. his son (an infant) in tail, remainder to C. and made D. overseer of his will, and that D. should have the education of B. till 21, and to receive, sell and let for B. the said lands, and thereof to account to B. and D. to be allowed his charges. D. has no interest and is only guardian for nurture, and can make only leases at will. Cro. E. 678. pl. 10. adjournatur, but ibid. 734. pl. 2. Hill. 42 Eliz. B. R. adjudged, absente Gawdy. Piggot v. Garnish.

The words to receive, let, and let for B. means only that leases shall be made in B's name, and D is only as bailiff to

account; per Fenner and Clench J. and Popham held that a testator cannot appoint that any shall make a lease for years in the name of devise. Cro. E. 678. in S. C. —S. C. cited by Whitlock in Lat. 39. —S. C. cited Arg. 5. Mod. 102.

7. Devise of lands to his wife for life, so long as she shall be effectually ready to demise to his heirs at 50 l. per annum when she shall not dwell on it herself. The wife goes and lives at another place, yet the condition is not broke unless there be a tender and refusal to demise. Mo. 626. pl. 860. Mich. 43 & 44 Eliz. in Canc. Sir Cha. Rawleigh v. Thynn.

Lane 78. S. C. cited.

8. Lands devised to persons *in trust to let leases and distribute the profits to twenty of the poorest kindred* of devisor; the twenty, &c. have but a confidence. Mo. 753. pl. 1040. 2 Jac. in Exchequer, Griffith v. Smith.

Mo. 774.

pl. 1069.

S. C. held according-ly, and that the estate

remains by descent in the son, and yet if it were an estate in the son immediately and also for years in the executor, yet by the death of the son before 24 the interest of the executor is determined by the son's death, because it was not the devisor's intent to bar the son's heir till the son should have come to 24 years if he had lived.—Brownl. 88. S. C. & S. P. held accordingly.

—S. C. cited Arg. 5 Mod. 102. as adjudged that the executor had only a stewardship for the benefit of the heir.

S. C. cited

4 Mod.

318, 319.

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10. A copyholder in fee surrendered to the use of his will, and devised to his wife his copyhold land, *and if she hath issue*, by the devisor, that the issue shall have it at the age of 21 years, and if the issue die before that age or before his wife, *or if she has no issue, that then she shall choose two attornies, and she to make a bill of sale of my land to her best advantage, &c.* Per Cur. she has those lands for her life, and she not having issue, hath not any interest to dispose, but has authority by her will to nominate two that shall sell, and they make sale, and the vendee shall be in by the will without any new surrender Cro. J. 199. pl. 30. Mich. 5 Jac. B. R. Beale v. Shepherd.

S. C. cited

by Bridg-

man Ch. J.

Cart 26,

27. as ad-

judged

Pasc. 18

Eliz in the

Exchequer

—2 Chan. Rep. 126. Warwick v. Cutler. S. P. — 3 Le. 78. Anon. per a J. that it is only a confidence, but if he had devised the profits it would have been a chattle in the wife and have gone to her husband who survived her.

Cro. J. 259.

pl. 19.

Aylor v.

Chap. S. C.

& S. P. by

4 Justic s,

Williams J.

• contra ;

and adjudg-

ed for the

plaintiff.

—Brownl.

147. Aylet

v. Chippin.

S. C. ad-

judged ac-

cordingly

per tot. Cur. except Williams.

—Bullst 42. Eylse v. Chopley. S. C. adjudged accordingly.

12. Devise to A. and B. his sons and the heirs male of their body, and wills, *that they shall not enter till their several ages of 21 years*, and further wills, that *M. and N. his executors shall have the lands to perform his will, till his said sons A. and B. come to their several ages of 21 years.* The executors have only a limited estate determinable in time, when each son *separatim* comes to his full age for his part, and each of the sons may enter when he is 21, and such entry does not destroy the jointure, but they shall be joint-tenants notwithstanding; for this entry in the intent of the devisor, was only as to the perception of the profits and as to the possession, and not as to the estate in jointure. Yelv. 183. Mich. 8 Jac. B. R. Aylet v. Choppin.

13. If

13. If one devise his *land* to another *until his debts be paid*, the executors have a term; per Coke Ch. J. 3 Bulst. 100. Mich. 13 Jac. in case of *Blamford v. Blamford*. It is but a chattel interest and determines at law when the *trust is satisfied*; per Lord Wright. 2 Vern. 404. Mich. 1700. *Hilchins v. Hilchins*.

14. A. has a lease for years, and devised, that after his decease the profits of this *shall be put out to the use and benefit of B.* This is a devise of the lease itself, per Doderidge J. and Coke Ch. J. agreed this to be so, and said that so is 45 E. 3. Tit. Feoffments and Fairs; for this is tantamount to a devise of the lease. 3 Bulst. 101. Mich. 13 Jac. in case of *Blamford v. Blamford*.

15. A. devised several lands to B. his youngest son, some in fee, some for life, and some in tail, and then adds, *I will that my wife M. shall have the use and keeping of my son B. and all the premises to him bequeathed, during his natural life, paying him yearly for his maintenance 8 l. training him up in learning and what more of her own pleasure*; per Berkley J. she is only guardian, but per 3 J. it is an interest because of the limitation to her during her life. Cro. C. 568. pl. 5. Trin. 10 Car. B. R. *Spirit v. Bence*.

16. A man devises lands to his wife for life, and afterwards orders the same to be sold by his executors, and the monies thereof coming to be divided amongst his nephews, and makes A. and B. his executors and died. It was referred to three justices, who certified that the executors had not a good interest by the devise, *but an authority only*. Cro. C. 382. pl. 10. Mich. 10 Car. B. R. *Howel v. Barnes*.

17. A. seised in fee made his will, and R. his executor, and devised that his executor should receive the issues and profits of his lands for and towards the maintenance of his children till they should attain their respective ages of 21 years, and devised the residue of his lands to his son when he should be 21. R. the executor made his wife executrix, and died before the son came of age, having first devised that she should dispose the issues and profits according to the words of the first testator, *and gave her as full power as was given to him, and died*. The question was, If R. had a trust, or an interest by the will? adjudged that an interest was vested in R. the executor, and so his devise to his wife good. Carter 25 Trin. 17 Car. 2 C. B. *Courthope v. Hayman*.

18. Devise of profits till his daughter come to age of 21 years towards payment of his debts and legacies. The daughter died at five years old. It is a good devise of the term till the daughter would have been 21. Per Ld. Keeper. Chap. caes 113. Mich. 20 Car. 2. Carter v. Church.

such time as A. would have been 21, had he lived; because the testator might have computed how long it would be before his debts could be paid. 2 Mod. 290. cites 3 Rep. 19. *Boraston's case*.

19. Devise of a rent charge to his wife for life, and after says, *if she marry, my executors shall pay her 100 l. and the rent shall cease*, and return to his executors. The rent continues till the 100 l. is paid, and she nor her executors have present interest in it. Mod. 273. pl. 25. Trin. 29 Car. 2. B. R. *Osborn v. Walleeden*.

And the executors (to whom the devise was) shall continue in possession till

2 S. and 197. *Osborn v. Walleeden*. S. C. —Keb. 712. pl. 25. S. C.

20. The testator *devises lands to be held by his executors till the testator's son attained 22 years of age, for maintenance of the executrix and her children*, that the said testator's son died before 22 years of age. This court decreed the executrix to hold the lands against the next heir, until the said son's age of 22 years, as if the said son had lived to 22 years. 2 Chan. Rep. 136. 30 Car. 2. Warwick v. Cutler.

21. A. by will made B. executor, and gave the residue of the goods to the disposal of B. the executor, and C. Before probate of the will B. died and made M. her executor; agreed, that the bequest of the residue by the words aforesaid was a bequest of the interest, and not an authority only. And that neither this interest nor moiety of the residue should accrue by survivorship to C. in this case of a legacy as it would be in a gift of goods at common law. 2 Jo. 161. July 5. 33 Car. 2. before Commissioners Delegates. Taylor v. Shore.

22. A. devised land in trust to pay one third of the rents in satisfaction of dower, until his son, then two years old, attains 21. The wife receives a third of the rent from the trustees and dies, then the son dies during his infancy. The administrator of the wife shall have her third of the rents till such time as the son might have attained 21. 2 Vern. R. 65. pl. 59. Trin. 1688. Coates v. Needham.

Ibid. cites
Boraston's
case. 2 Rep
19 a.—
2 Vern.
138. Pasch.
1690. Le-
vet v.
Needham.
S. C. takes

notice of a former hearing, and observes that it was adjudged that the bequest to the wife was determined by her death, and should not go to her administrators, and on that a point arose to whom it should go, it was decreed by the Lords Commissioners in favour of the heir.

2 Jo. 161.
Taylor v.
Shore, S. P.

23. Devise of land to B. in fee, *paying 400 l. whereof 200 l. to be at the disposal of his wife by her will, to whom she shall think fit*. She dies *intestate*; her administrator shall have it, the whole interest and property being vested in her. Per commissioners. 2 Vern. R. 181. pl. 163. Mich. 1690. Robinson v. Dufgale.

Gilb. Equ.
Rep. 36.
Mich. 10
Ann. in
Canc. S. C.
and says
that there
was no
mention of
payment of
debts, and
decreed by Lord Harcourt accordingly.

24. Lands were devised to the wife *till his son and heir should be 21, and then to his son and his heirs*, and the son died at 13. Though she was executrix, yet not being devised during that time for payment of debts, nor any creditors or want of assets appearing * Harcourt, C. decreed that the wife's estate determined by the son's death, and the remainder vested presently on testator's death. Abr. Equ. Cases 195. Hill. 1713. Manfield v. Dugard.

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25. Ridge devises by his will *the residue of his estate to his wife, and desires her to give all her estate at her death to his and her relations*, the question was if this does amount to a devise or trust in the wife, for all the estate which her husband gave her by his will.

Harcourt C. said, I think these words are *too general to amount to a devise over of his estate after the death of the wife, nor can it be taken as a trust*, because the words extend to all the estate which she shall be possessed of at the time of her death, which the husband has not any power over, and therefore it must be *taken over as a recommendation*.

recommendation and not as a devise or trust, but if the testator had desired his wife by his will to give at her death all the estate which he had devised to her to his and her relations, there the estate devised to her ought to go after her death to his and her relations, according to the statute of distributions. There was a case *tem-pore Cowper C.* where one Knight devised by his will 2000 *l.* *to be paid and distributed amongst his poor relations, at the discretion and according to the conscience of his executors.* A bill was brought against the executors and residuary legatee, by several of the testator's poor relations that were next a-kin, and might claim per *stat.* of distribution, and another bill was brought by 20 of his poor relations of a remoter degree, and upon the question who were entitled to this legacy, Cowper C. decreed that *this legacy should be divided amongst all his poor relations of what degree soever,* and for that purpose ordered notice to be given in the Gazette, that any person who should go before the Master and prove himself related to the testator within six months, should be entitled to a share of his legacy, but left it to the executors to ascertain the proportion according to the power given them by the will, but ordered if the executors should refuse any such poor relation, or shew any partiality, that the Master should report it specially, with the reasons given for it, but he would not take away that power from the executors which the testator had given them. Bill dismissed per Harcourt C. MS. Rep. Pasch. 12 Ann. in Canc. Palmer v. Schribb.

26. A. gave the residue of his estate to his wife, *with power to dispose thereof with the approbation of his trustees.* She made a will and devised it to J. S. Per Cowper C. The devise is void, she not having the consent of the trustees, and so A. died intestate as to the residue of his estate. 2 Vern. 723. pl. 640. Mich. 1716. Hutton v. Simpson.

Ch. Prec.
452. Simp-
son v.
Hornby.
S. C.

27. A. seised of land of 600 *l.* per ann. devised 300 *l.* per ann. to C. an infant son of B. which B. was heir at law to A. and devised 300 *l.* per ann. to B. *for his care and pains in looking after his son's estate till he should be 21.* B. died, C. then being six years old, but B. by will devised the 300 *l.* to his wife, and appointed her guardian to C. his son. Per Ld. Macclesfield, the father B. being appointed guardian, was the only person that could extend his care as a guardian after his own death; that *the father had by law a power to appoint a guardian over his own children,* and that his devise of the 300 *l.* per ann. is good, and that it did not determine neither by the wife's death, unless for want of care of the son or his estate, which if it happened the son might complain of. Ch. Prec. 597. Trin. 1722. Anon.

(N. b. 2) Continuance of a Devise. With or without the Word Until, &c.

1. A. Devised lands to his four younger sons, and if they die without issue, then to go to the eldest son; three of the four died, It was held that nothing should go to the eldest till all four were dead without issue. D. 303. b. 304. a. pl. 49. Mich. 13 & 14. Eliz. Anon.

2. A. had three sons B. C. and D. and devised that *Black-acre should remain after his wife's death to C. and his heirs*, and if it fortune that *D. lives till the land come to C. then I will that C. shall pay to D. 10 l. per ann. so long as D. lives.* A. died. C. came to the land; resolved that the devise enures as a rent-sock for life to D. with which the land shall be charged in the hands of the heirs or assigns of C. Mo. 721. pl. 1007. Mich. 32 & 33 Eliz. Andrew v. Sheffield.

3. A. devised to J. S. *until he shall or may raise 500 l. out of the profits of the land.* If a stranger enters after the death of the devisor, though *J. S. had no notice of the will*, yet the time shall run on as much as if he had had the land in his own possession. 4 Rep. Mich. 41 & 42 Eliz. in the court of wards. Sir Andrew Corbet's case.

4. But when the heir of the devisee himself, or he in reversion or remainder enters upon such devisee and *expells him*; he may re-enter and retain the land further, until he has levied the intire sum, and the time in which he was expulsed shall not be accounted parcel; for he that did the tort shall not take advantage of it. 4 Rep. 82. a. b. Mich. 42 & 43 Eliz. the second resolution in Sir And. Corbett's case.

5. A. devised a term to *M. his wife*, remainder to *his son B. and L. his wife if they have no issue male*, and if they have issue male, then to be reserved and put out for the benefit of such sons or one of them. A. dies. M. the wife of A. shall hold during her life. But B. and L. his wife shall hold only till a son is born, and then the son shall have the term, and if a son or sons were born in the life of M. then such son or sons should take immediately upon her death, and B. and L. his wife shall take nothing. Mo. 846. pl. 1146. Hill. 13 Jac. Blanford v. Blanford.

Cro. J. 394. pl. 7. S. C. but instead of the remainder after the death of the wife being limited to B. and L. his wife, and if, &c.

It is stated to be limited after testator's wife to testator's two sons, and if those sons have no issue male, &c. and resolved by three justices, that the son born shall have it presently, and that his intention in the will was, that his two sons should not have it if they had a son, and his care was for his grand-children, rather than for his children. — Godb. 266. pl. 367. Blanford's case. S. C. stated and adjudged accordingly. — Roll. Rep. 318. pl. 29. S. C. stated as in Cro. and judgment accordingly. — 3 Bull. 98. Blamford v. Blamford. S. C. stated as in Cro. and largely argued, and judgment accordingly, but with a cesset executio till term. Pasch. next ensuing.

Mod. 272. pl. 25. Of-born v.

6. Devise to a feme sole of *12 l. per ann. to be issuing out of Black-acre*, but if she marry, then the executor to pay 100 l. and 12 l. rent

12*l.* rent to cease and return to the executor, Testator dies, the rent was paid to the devisee. She marries. The rent shall not cease till the 100*l.* paid. Adjudged by three justices, but Twidenden contra. 2 Sand. 197. Mich. 22 Car. 2. Osborn v. Wickenden,

Walleeden. S. C. adjudged by two justices, to which Twidenden

consented, though he was of a contrary opinion.

7. Devise to *B. durante exilio, and if please God to restore him to his country or he die, then to J. S.* must be construed according to the nature of the exile, which being voluntary upon a displeasure conceived against him, and the withdrawing a pension from him, and is therefore to continue till he is reinstated and the pension allowed him; and judgment accordingly. See 2 Lev. 191. Patch, 29 Car. 2. *B. R.* Paget v. Voscius.

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Vent. 326.
S. C. & S. P.
accordingly.—2 Mod.
223. S. C.
held accordingly.
—2 Jo.

73. S. C. adjudged — Freem. Rep. 448. pl. 610. Dr. Voscius's case. S. C. says, the court persuaded the parties to a reference, and so it was referred to Serjeant Pemberton and the Recorder of London. — 3 Keb. 842. pl. 7. S. C. adjudged.

8. Termor for years determinable on lives, devises 20*l.* per annum to *J. S.* to be paid half-yearly out of this estate *if cesty que vies so long lives.* *J. S.* dies, yet the rent continues and shall go to his executor so long as the term lasts. 2 Vern. 35. pl. 27. Hill 1688. Gosley v. Gilford.

9. Devise of the rents and profits of lands till his son attain 21, towards payment of debts; and if my son die before 21, my debts being paid, then to *A.* The son dies before 21; yet the rents and profits not only, till he would have attained 21, but also beyond, till the debts be paid, shall be applied for that purpose. Rawlinson admitted, that if the testator had only devised the profits till his son should be 21, towards payment of debts and had gone no farther, that it should have been carried no farther than till the son would have attained to that age; but Hutchins was of opinion, that even in that case the profits should be applied to pay the debts beyond the age of 21, if those to that time were not sufficient to discharge them all. Chan. Prec. 34. pl. 36. Mich. 1691. Martin v. Woodgate.

10. Devise to *A.* and the heirs male of her body, upon condition that she intermarry with and have issue by one surnamed Searle, and in default of both conditions he devised it over to *B.* in the same manner, with remainder over to *C.* Adjudged that this is a good estate tail, that the words of condition amount to a limitation, and that the estate of *A.* or *B.* does not cease though she marries one of another name, for the remainder is in default of both conditions, and in the mean time it is limited to her and the heirs males of her body, and she may survive such husband and marry a Searle, and so there is a possibility as long as she lives. 2 Salk. 570. pl. 6. Trin. 3 Ann. B. R. Page v. Hayward.

11. *A.* devised a college lease for 21 years to his wife for life, remainder to his son, she paying 10*l.* per annum to his son during her life; the son dies in the life of his mother, the 10*l.* per annum continues during the life of the wife and will go to the son's executors,

cutors, and decreed the wife to renew the lease and the master to settle the proportion of the charge; per Lord Keeper. 2 Vern. 666. Mich. 1710. Lock v. Lock.

A. devised 5l. per ann. to C. (without adding to his executors or administrators) to be

paid to him *during B's life on condition, C. behaves civilly to B.* and made B. his executor and died. Per Master of the Rolls the 5l. per annum determines by the death of C. It is a personal bequest, and the condition is not performable after C's death. Ch. Proc. 173. pl. 143. Mich. 1701. Neale v. Hanbury.

13. A man devises *lands to his wife until his son shall attain the age of 21 years, and then to his son and his heirs; the son dies at the age of 13.* The question was, if the estate devised to his wife did determine by the death of his son at 13 years of age, or should continue till the son might have attained his age of 21 years by the effluxion of time? Harcourt C. of opinion that the *wife's estate did determine by the death of the son, and differs from BORASTON's case.* Co. for there the devise was to executors for payment of debts otherwise unprovided for, but *here the wife comes in for her thirds*, and that is a sufficient provision for her in the eye of the law. Decreed accordingly per Harcourt C. MS. Rep. Hill. 12 Ann. in Canc. Mansfield v. Mansfield.

14. A. had three sons, B. C. and D. and by will *devised all his lands to D. for his life, he or his heirs paying out of the rents of the premises 10l. a year to his eldest son B. for his life, and 10l. a year to his second son C. for life, and that after the death of B. and M. his wife, then the son or sons of D. should have all the premises equally between them, they or their brothers paying the legacies aforesaid,* and if no such son, then the daughter or daughters of the said D. to have the said premises equally amongst them, paying, &c. Ld. C. Parker held that these rents were not to sink upon D's death and during the life of the wife (who had an estate for life by implication as his lordship held) they being expressly given to the several annuitants for their lives, and were plainly intended as a certain provision for them in all events during their lives. So that *it is as if these annuities were given in the first place by the will to the annuitants, and the lands afterwards given subject to the said annuities;* whence it seemed the testator's intent was that whoever took the land should pay the annuities, and that D's wife should be liable. Wms's Rep. 472. Trin. 1718. Willis v. Lucas.

15. *I give to my wife all my lease at S. and all my household goods, she maintaining my children, but if she should marry, then a moiety of it among my children;* the children shall have no more than a maintenance unless she marrieth. MS. Tab. Feb. 25th, 1725. Seagrave v. Eustace.

16. *Devise to my daughters until my son shall attain the age of 40 years, hoping by that time my son will have seen his folly. The son dies before 40, the devise to the daughters ceases. Devise to*
A. until

A. until B. shall attain 40 years. B. dies before 40. A's estate ceases; secus if the devise be made a fund to pay debts or portions, which cannot be raised until B. shall have attained his age of 40, in which case the word (shall) is taken for (should.) 3 Wms's Rep. 176. Hill. 1732. Lomax v. Holmeden.

(O. b) What passes by the Words, Residue of Estate.

1. **D**EVISOR made a *debtor executor*, and devised several legacies, and the *residue of all his personal estate to another*; decreed that the executor pay his debts to the residuary legatee, notwithstanding there was no want of assets, though it was objected that this case was different from former precedents. Ch. Cases 292. Mich. 28 Car. 2. Philips v. Philips. Fin. Rep. 410. Hill. 31 Car. 2. S. C. states it that by his will he gave all his real estate
and household goods, &c. and all his debts, goods in shop, &c. and the remainder of all his personal estate to be divided equally between the executor and another, and the court held, that the debts which the executor owed the testator were not discharged but ought to come into the account.——2 Freem. Rep. 11. pl. 10. S. C. Mich. 1726. Ld. Chancellor held clearly that it should not be extinct but should be cast in with the residue of the estate, especially in this case where debts are particularly mentioned, and this was a debt at the time of making the will; and that if the word (debts) had not been in, he believed it would be all one, but that made it more strong.

2. A. seized of land in fee and of mortgages in fee, devised all his lands to B. and then bequeathed 1500l. in legacies, and then says, all the residue of my personal estate I give to my executor. The lands in mortgage will go to the executor; but had A. only devised his lands, and without giving any other legacies, and had bequeathed the rest of his personal estate to his executors, there perhaps the mortgaged land should pass to B. for else there would be nothing to answer and make sense of the clause, "and the rest," &c. for that implies that he had already devised some part of his personal estate, or at least it shews that he intended part of it should have passed. Vern. 4. Pasch. 33 Car. 2. Winn v. Littleton. [293]

3. Testator made a *stranger*, and no relation to him *executor*, and gave him 50l. The executor in such case shall not have the residuum after debts and legacies paid by the next of kin to the testator, and so it was said had been decreed in the like case between Cordall and Cordall. It is true if the executor had been nearly related to the testator, it might have been otherwise; but even in such case, if there are other relations in equal degree with him and are poor and indigent, equity in such doubtful cases will give the residue amongst them. Salk. 12. pl. 1. Matthew v. Courthope.

4. It was admitted that in the devise of the residue of a personal estate, if a legatee was dead at the time of making the will the residuary legatees shall not have the benefit of that legacy, and it shall not fall into the residue, nothing being intended to pass by that devise but the residue after that and other legacies paid.

8 Mod. 126. Arg. contra in case of Goodwright v. Opie.—As to a lapsed de-

Arg.

wife of lands
in fee dubi-
tatur. See
8 Mod. 123.

Arg. 2 Vern. 395. pl. 366. Mich. 1700. in case of Sprigg v. Sprigg.

5. In construction of wills, generally the words *my estate, the residue of my estate, or the overplus of my estate*, may well pass an inheritance, where the *intent is apparent* to pass it; but such intent to carry an inheritance by such words must be very apparent, and *necessary* to be drawn from the words of the will and circumstances of the case; for if the words be *indifferent to real and personal estates or may be applied to personal alone*, there the heir at law is not to be disinherited by the implication of such words, or by any implication at all, but what is a necessary one. 12 Mod. 596. Mich. 13. W.

3. Per Trevor Ch. J. in case of Shaw v. Bull.

6. A man having *settled all his estate of inheritance upon his wife for life*, for her jointure, makes his will, and thereby *devises several pecuniary legacies* to several persons, and *then says, all the rest and residue of my estate, chattels real and personal, I give and devise to my wife, whom I make sole executrix*; and the only question was, whether by this devise the reversion of the jointure lands passed to the wife; and my Ld. Keeper having taken time to consider of it, delivered his opinion, that it did not, because *the precedent and subsequent words explain his intent to carry only his personal estate*; for in the first part of his will, having given only legacies, and no land whatsoever, the words, all the rest and residue of his estate, are relative, and must be intended estate of the same nature with that he had before devised, which was only personal; for having before given no real estate, there could be no rest or residue of that out of which he had given away none; then the words, chattels, real and personal, explain the word estate, and shew what sort of estate he meant; and make the devise, as if he had said, all the rest of my estate, whether chattels real or personal, &c. and so confine and restrain the extended sense of the word estate. Equ. Abr. 211, 212. cites Hill. 1712. Markant v. Twisden.

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7. A man seised of lands in fee, made his will, and thereby *gave several legacies, and then bequeathed in these words (viz.) I give the rest of my estate, chattels real and personal to J. S.* Per Harcourt Ld. Chancellor it was resolved, that nothing but his chattels passed by the word estate. MS. Rep. Hill. 11 Ann. in Canc. Anon.

8. A. seised of lands in fee, *directed his debts, &c. to be paid, and gave his wife power to sell (if need be) his lands, goods, &c. for payment of the same, and then to pay such legacies as are given by the will*; among which he gave his said wife 1000l. to be by her detained out of the first money that could be raised by the profits or sale of his estate, after payment of his debts. And the residue of his estate, after debts and legacies paid, he gave to his said wife E. whom he made sole executrix. Ld. C. Cowper was clear of opinion, that a fee passed by devise of all the rest of his estate to his wife E. subject to the payment of his debts, &c. But he held, that where a man devises all his estate, goods and chattles, and no mention had been

been made *before in the will of lands*, of which the testator was seised in fee, a fee simple will not pass; but where a real estate is mentioned before in the will, and then such words follow, a fee passes. 2 Ld. Raym. Rep. 1324. Mich. 1 Geo. in Canc. *Cliffe v. Gibbons*.

9. After a devise of several pecuniary legacies, testator added these words, *all the rest of my goods and chattels and estate*, I devise to my wife, &c. Decreed that an *equity of redemption of a copyhold of inheritance* of the testator's did not pass, but it should go to the heir at law. 8 Mod. 222. Arg. cited in the case of *Wright v. Horne*, as decreed Feb. 1724, in *Chancey's* case. Ibid. cites the case of *Wells v. Edwards*.—The reason of the case of *Wells v. Edwards*

was because the will began with pecuniary legacies, which shews that the testator did *not intend* to pass the equity of redemption of a mortgage. Arg. 8 Mod. 224. in case of *Wright v. Horne*.—But the words, *and other estate whatsoever*, carried other lands; per Finch C. Chan. Cases 262. Trin. 27 Car. 2. *Tirrel v. Page*.—So where no lands were devised after pecuniary legacies, the words were *all the rest and residue of my estate and chattels real and personal*, I give and devise to my wife; this does not give the reversion of lands settled in jointure on the wife. G. Equ. R. 30. Hill. 6 Ann. *Marchant v. Twifden*.—Abr. Equ. Cases 211, 212. S. C. by the name of *Markant v. Twifden*.

10. A. by will gives several pecuniary legacies, and after devises lands to trustees and their heirs *in trust, that they do and shall, by mortgage or sale* of the said premisses, or any part thereof, *pay and satisfy his debts*, and the said legacies *and funeral expences*; then he devises *all his goods, chattels and household-stuff in such a house to another, and then goes on in these words, all the rest and residue of my personal estate I give and devise to my wife, whom I make sole executrix*; per Cur. the residue of the personal estate belongs to the wife, in the nature of a specific legacy, exempt from debts, legacies and funerals; for though the personal estate is the natural fund for them, yet here he has expressly provided another for that purpose, by words of an imperative signification, *that the trustees do and shall, &c.* which is stronger than a bare charge of them on his real estate, and might be intended only auxiliary to his personal estate, which without words of exemption, might be liable in the first place; and though the words *rest and residue* of his personal estate are generally understood *rest and residue after debts, legacies and funerals*, yet here they are relative to the last antecedent of the devise of his goods, chattels and household-stuff at such a house, and pass to his wife as a specific devise, in the same manner as the next preceding devise did to the devisee thereof, and are to be understood the residue of what he had not before particularly devised, not the residue after debts paid. Abr. Equ. Cases 271. pl. 13. Hill. 1724. at the Rolls. *Adams v. Meyrick*.

11. A. gave specific legacies to his daughters, and other legacies to others; then he gave all the residue of his estate *to W. R. &c. in trust to increase his daughters portions*. Decreed that this gave the daughters a fee. 9 Mod. 92. Pasch. 10 Geo. 1. in Canc. Anon.

12. A devise of lands to R. B. and his heirs for ever, upon condition he pay all my debts and legacies and funerals, and if he do not pay them, then I devise the premisses to E. F. (the defendant) and her heirs for ever. And as to all the rest and residue of my real and personal estate whatever not herein before bequeathed, I give and bequeath

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queath to E. F. and her heirs; the devisee R. B. died before the deviser, so it was a lapsed legacy; the court held that E. F. could not take by the said words, "all the rest and residue of my real and personal estate not devised or unbequeathed," the lands devised to R. B. for it must be expounded, the rest and residue of the lands undevised at the time of making the will, and not at his death. Fortescue's Rep. 184, 185. Pasch. 2 Geo. 2. C. B. Roe v. Fludd.

13. Sir Brook Bridges by his will gives several legacies to his daughter and other relations, and then follows this clause; *I give the remainder of my estate, viz. my Bank-stock, India-stock, S. S. stock, and S. S. annuities to my son B. Bridges, and I do hereby make him sole executor of this my will, &c.* Quære, If these words, viz. All my Bank-stock, &c. do restrain the general precedent words, the remainder of my estate? King C. was of opinion that the latter words which came under the viz. do not restrain the general words precedent (the remainder of my estate) but were added by way of enumeration or description of the main particulars whereof his estate did consist, and not to restrain the word (estate) to those particulars, and the rather because immediately after follow the words, and I do hereby make him sole executor of this my will, and when he disposes of the remainder of his estate, it is plain he did not intend to die intestate as to any part of it. Decree, that the son was intitled to all the residue of the testator's estate. MS. Rep. Hill. 2 Geo. 2. in Canc. Bridges v. Bridges.

14. The words residue of estate do not always necessarily imply that any thing was before thereout disposed of; for they are merely words of course, always inserted by the penner of the will, whether there be any precedent bequest or not, and in truth are never improper, because no executor can be said to take more than the residue, it being impossible for a man to die without leaving some small debts behind him, or if it could be so, the funeral expences must always be borne by the executor; per the Master of the Rolls. 4 Nov. 1738, in case of Miles v. Leigh.

(P. b) What passes as Incident or Appurtenant; or by the Words Cum Pertinentiis.

3 Le. 214.
pl. 283.
Chard v. Tuck S. C.
Resolved
clearly,
that the
curtilage
and garden
did pass;

1. A Man seized of a messuage to which a garden and curtilage did belong, and there was no way to the garden but through the messuage; devised the messuage to his second son in fee; but mentioned not the garden and curtilage, nor said cum pertinentiis; it was adjudged notwithstanding that they did pass; for they agreed clearly, that the curtilage is parcel of the house, but they doubted of a garden, because it is but a place of pleasure; but afterwards resolved that the garden did pass, because it is as well for necessity as for pleasure.

pleasure. Cro. E. 89. pl. 14. Hill. 30 Eliz. B. R. Carden v. and Wray
Tuck. Ch. J. said, it matters not whether the curtelage and garden are before the house or behind it; for in both cases they shall pass.

* 2. A man gave instructions to another to make his will in this form; I will that B. *shall have my house, with all my lands thereto appertaining*; and the other made it in these words, *I devise to B. my house with the appurtenances*; and it was adjudged that it should pass by this word appurtenances. For although that in late books lands shall not pass by this word appurtenances, yet there is good authority to prove that they shall pass, as 7 H. 5. and T. 21 E. 3. 18. And wills shall be taken by the meaning. Gouldsb. 99, 100. pl. 3. Mich. 30 and 31 Eliz. cites it as a Cambridgeshire case about a year before.

3. J. S. Lord of the manor of S. within which there is a place called Ebley, in which is a house, and six acres of land, to which divers other lands throughout the whole manor were appertaining, and had used to be let with it by the space of 60 years, and had always passed by one grant, and under one rent; J. S. devised that his brother T. S. should have the tenement with the appurtenances in which H. B. dwelt in Ebley 60 years, rendering 4 l. per ann. (the ancient rent being 45 s.) but the house and six acres was worth 5 l. It was the opinion of the justices in this case, that the lands out of Ebley should pass. Cro. E. 113. pl. 11. Mich. 30 and 31 Eliz. B. R. Boocher v. Samford.

4. A. seized of a messuage and two acres of land in N. and of two acres of meadow in K. used and occupied the said two acres in K. with his lands in N. and in his will devised the messuage, *cum domibus & singulis pertinentiis ad inde vel aliquo modo spectantibus*, to K. filio suo & hæredibus suis in perpetuum, and for want of such issue to E. his daughter for ever. Resolved, that by the devise cum pertinentiis, the two acres of meadow did not pass; but otherwise it had been, if it had been *cum terris pertinentibus*, for then that which was used with it would have passed. Cro. C. 57. pl. 1. Hill. 2 Car. in C. B. Hearn v. Allen. Hutt. 85. S. C. and S. P. held accordingly.—Litt. Rep. 5. Kene v. Allen. S. C. and S. P. resolved accordingly.

5. *Messuage* in a will carries a garden and curtelage, but *house* will not, especially without cum pertinentiis, or like words. 2 Ch. Cases 27. Arg. Trin. 32 Car. 2. Messuage carries both where there is no way to them but through the house. 3 Le. 314. pl. 283. Hill. 30 Eliz. B. R. Chard v. Tuck.

6. By devise of a mill, a stone taken out to be new cut shall pass as part of the mill; per Holt Ch. J. 6 Mod. 187. Trin. 3 Ann. B. R.

(Q. b) What Words carry what Personal Estate and Chattles Real.

1. **L.** By his will gave and bequeathed to his wife, the *third part of all his goods and chattles*. Quære, if she shall have only the third part of the goods and chattles after the other legacies paid, or the debts paid, or if she shall have the third part of the whole, the *debts*, &c. not deducted; and also whether the third part of the debts due shall pass by those words (*bona & catta*) D. 59. b. pl. 15. Pasch. 36 and 37 H. 8. The Queen v. Ld. Latimer.

2. The word *utenfils* will not pass plate or jewels; all the justices seemed to be of this opinion. D. 59. b. pl. 15. Pasch. 36 & 37 H. 8. in case of the Queen v. Ld. Latimer.

[297] 3. If one *has goods worth 100l. and is indebted in 20l. and bequeaths to his wife the moiety of all his goods* to be equally divided between her and his executors, she shall have goods to the value of 50l. D. 164. pl. 57. Trin. 4 & 5 P. & M. Anon.

Moiety of all his goods passes only the moiety of what remains after debts paid. For that only is to be accounted the testator's which he hath *ultra se* alienum. Wentw. Off. Executors 250.

Ruled that a devise of the *moiety of the personal estate to the wife*, and then of *diverse legacies and after of the remainder* to another, gives a full moiety to the wife, if the other be sufficient to pay the debts, and that the debts shall go out of the other moiety. Chan. Cases 16. Mich. 14 Car. 2. Lee v. Hale.

4. *A lease for years of a house passes intirely by a devise of the house without other limitation.* D. 307. b. pl. 69. Hill. 14 Eliz. Anon.

Sty. 282.
S. C. cited
Arg.

5. Earl of Northumberland devised by his will *his jewels* to his wife. *Garter and collar of S. S.* do not pass, because they are not properly jewels but ensigns of honour and state, and a buckle in his bonnet and buttons annexed to his robes do not pass because they were annexed to his robes and were therefore no jewels. But other chains, rings, bracelets, and jewels, pass by virtue of the said will. Resolved by Wray and Anderson Ch. J. to whom this matter was referred. Owen. 124. 26 Eliz. Earl of Northumberland's case.

S. C. cited
D. 261. b.
Marg. pl.
27. as Trin.
3 Jac. B. R.
—So a devise of *lands and tenements* will pass a *lease for years*, if there are no other lands to pass by those words in the place expressed in the will. Arg. Sty. 279. in case of Sanders v. Rich. — But if there are other lands the leases will not pass. Sty. 293. Arg. in case of Kirman v. Johnson cites Bartlett v. Rhodes

6. A. made lease for years of Black-acre and another lease for years of White-acre and he devised all *his goods, plate and jewels (except the lease of Black-acre)* to J. S. The lease of White-acre passes by such devise, because the intent appeared by the *exception*. Noy. 112. Fitzwilliams v. Fitzwilliams.

Leases for years will pass a *lease for years*, if there are no other lands to pass by those words in the place expressed in the will. Arg. Sty. 279. in case of Sanders v. Rich. — But if there are other lands the leases will not pass. Sty. 293. Arg. in case of Kirman v. Johnson cites Bartlett v. Rhodes

7. *All his moveables* do not pass debts, corn, fruit growing, stone, nor timber prepared for building, as the canonists and civilians hold. Wentw. Off. Executors 250.

8. A.

8. A. bequeathed to his wife all her apparel, she shall not have, as some civilians say, her ornaments of gold and silver, by which is meant, as he takes it, chains, jewels, bracelets, rings, &c. But others are of contrary opinion, except they are such things as are lawful for her to wear. Wentw. Off. Executor 250.

9. By bequest of a bed, it seems not only the bed, bedstead, bed-cloaths, but also the curtains and vallance' pass. Wentw. Off. Executor 250.

10. Bequest of a coach he thinks does not pass the horses, but perhaps the harness or furniture of the coach-horses may pass as appurtenant to the coach; for so he thinks they shall do rather than by bequest of the coach-horses without the coach. Wentw. Off. Executors 250.

11. A man devised all his moveable goods and chattles; debts due to the testator did not pass by this devise; because debts are jura, and cannot be devised by those words. Jo. 225. pl. 1. Trin. 4 Car. B. R. Sparke v. Denn.

12. By a devise of all my plate; new-plate purchased after does not pass. But if I devise all my personal estate, and acquire more and die, all passes. Because in the last case the intention is plain by the words, that all the personal estate should go to the legatee. But in the first case it could not be reasonably so intended. Arg. [298] Holt's Rep. 241. cites God. Orp. Leg. 274.

13. Ruled that by the bequest of a moiety of the personal estate, where the testator had monies, bonds, and a lease for years, a moiety of the lease passed, though it was objected that that was not usually reckoned personal estate. Chan. Cases 16. Mich. 14 Car. 2. Lee v. Hale.

14. A testator having 1000l. due upon a mortgage devised the profits of it to the defendant for her livelihood and maintenance, and after her death without issue to the plaintiff, and made the defendant executrix and died. The plaintiff preferred his bill in this court to compel the defendant to give him security, that the money should be preserved to him, in case she should die without issue. The plaintiff's bill was dismissed; and by Mr. Attorney a mortgage cannot be entailed, being for security of a personal duty and to go to the executor. 2 Freem. Rep. 40. 41. pl. 44. Mich. 1678. Dingley v. Dingley.

15. A man deviseth his household goods and stuff to his wife, and died, having made his daughter executrix. The question was, whether or no by this devise the wife should have the plate that was commonly used about the house, viz. A silver tankard, twelve silver spoons; and likewise whether she should have a bracelet which she used to wear and some pieces of old gold, viz. two pieces that were given her to join in a fine by her husband and some other pieces that were given her before marriage by her godfathers and other friends, which she had kept all the time of her marriage. Resolved that the tankard and spoons commonly used about the house, will pass by the devise of household goods; and for the bracelet and pieces of old gold which her husband gave her, and permitted her to use and dispose of in his life-time, it cannot be intended that he designed to

take them away at his death without exprefs words; and ſince the wife might have diſpoſed of them, and have ſold or ſpent them, but ſhe hath not, but hath been a good houſewife and ſaved them, they ſhall not now be taken from her, there being no want of aſſets for payment of debts. 2 Freem. Rep. 64. pl. 73. Hill. 1680. Flay v. Flay.

S. C. cited by the name of Earle's caſe, by Jones J. ſitting in the abſence

16. By the general words in a will (I deviſe all my goods, chattels, and houſhold-ſtuff in and about my houſe to, &c.) 407 l. ready money in the houſe ſhall not paſs to the deviſee, ſhe having had a particular legacy of 1200 l. deviſed to her by the ſaid will. 2 Chari. Rep. 190. 32 Car 2. Sanders v. Earle.

of the Lord Chancellor. Chan. Prec. 8. pl. 6. Hill. 1689. in an anonymous caſe, that it was decreed it ſhould not paſs by the will; for 400 l. is a conſiderable ſum, of which the teſtator cannot be ſuppoſed to miſconſult of its being in the houſe; then had he an intent that that money ſhould have paſſed, he would not have conched it under the general words (of all his goods and chattels) but would at firſt have given her 1600 l.

17. A man having a mortgage in fee enters for a forfeiture, and after ſeven years enjoyment abſolutely ſells the land to A. and his heirs. The eſtate ſhall not be looked on to be a mortgage in the hands of A. ſo as to make it part of the perſonal eſtate, but it ſhall be for the benefit of the heir. Vern. 271. pl. 267. Mich. 1684. Cotton v. Iles.

18. Chymical receipts are not to be reckoned part of a freeman's perſonal eſtate. Vern. 63. Mich. 1682. Jenks v. Holford.

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So it will paſs by deviſe of all his goods,

but not by a grant of all his goods. Cro. E. 386. pl. 9. Paſch. 17 Eliz. B. R. Portman v. Willis. — Mo. 352. pl. 474. S. C. the court inclined that the term would paſs by the words (omnia bona) if there be no other circumſtance to guide the intent of the teſtator. — Goldſb. 129. pl. 23. S. C. but left a quære.

20. Perſonal eſtate is a fluctuating thing, and therefore if a man deviſes all his perſonal eſtate, all paſſes, though after the publiſhing the will the eſtate increaſes. 2 Vern. 137. in pl. 135. Paſch. 1690. Arg. cites Northcot v. Northcot.

21. A. poſſeſſed of a long term for years, deviſes it to B. for life, and after his deceaſe to C. for life, and ſaith nothing what ſhall become of the remainder of the term after the deceaſe of B. and C. The queſtion was, whether the executors of C. or the executors of A. ſhould have it as a reverſionary term? and it was argued by Levins, that the executors of C. ſhould have it; for that in law, it being deviſed for life, the whole term paſſed, and C. being the laſt deviſee ſhould have it. But it was held by the court, that it ſhould revert to the executors of A. becauſe, it being expreſsly limited to C. for life, it doth not appear to be the intent of the teſtator, that his executors ſhould have it; and they ſaid, that ſince it was now held, that a deviſe of the remainder of a term after an eſtate for life is good, there could be no reaſon given why, if the remainder were not deviſed, it ſhould not remain in the executors of the deviſor. But it was here admitted, that if, after the death of B. it had been

limited to C. and his assigns, or to C. generally, without saying for his life; or if it had been said, if C. die without issue, then to a third person; in all these cases the executors of C. should have it; but when the testator gives it for his life expressly, and is silent as to the residuum, there it shall remain with the executors of the deviser. Freem. Rep. 272. pl. 299. Mich. 1697. C. B. Anon.

22. A devise of goods to A. for life, with remainder after the decease of A. to B. it is now clearly settled, that it is a good devise to B. and that B. may exhibit a bill against A. to compel him to give security that the goods shall be forthcoming at his decease; and it is all one whether the goods or the use of the goods be devised for life. 2 Freem. Rep. 206. pl. 280. Mich. 1695. Anon.

23. A. devised that the furniture and pictures of his three * houses at B. C. and D. should go along with the three houses, and that his gilt plate belonging to his chapel shall be solely appropriated to that use. Adjudged that the plate then at three houses pass. 2 Vern. 512. pl. 460. Mich. 1705. Franklin v. the Countess of Burlington.

* The testator had plate which be always took with him as he removed from one house to another.

Per Lord Wright, though furniture in a large sense takes in plate, yet not here because he distinguishes the chapel-plate from the furniture, and the plate of ordinary use that was carried about with him can no more be said the furniture of one house than the other, and he meant only the particular furniture of each house, so the plate went to the executors, and was assets. Ch. Prec. 251. S. C.

24. A. devised his house and all his goods and furniture therein to B. for life, and after B's decease to C. and his heirs, except the pictures which he thereby gave to D. A. had pictures hung up in his house, and also pictures in boxes, and he frequently bought and sold pictures. Per Ld. Keeper, the pictures pass not by the devise to B. but the exception shall extend to those hung up, and those in boxes, and as well to those in the house at the time of the will, as to those brought in after the will made. 2 Vern. 528. pl. 482. Hill. 1705. Gayre v. Gayre and North, & al'. [300]

25. Plate shall pass by a devise of household goods. 2 Vern. 638. pl. 567. Hill. 1708. Lillcott v. Compton.

Ch. Prec. 207. pl. 167. Mich.

1702. in case of Jeffon v. Effington. S. P. Ld. Keeper was of opinion that by a devise of all rings and household goods, plate used in the house did not pass.—It was formerly held that by the devise of all the testator's furniture or household goods, plate in common use would not pass, in regard it was but curta supellex; but as the nation grew richer, and plate became a more common furniture, it had been construed to be included within those words. Wms's Rep. 425. in a note at the bottom of the page, says it was so said by the Master of the Rolls. Pasch. 1731. Budgen v. Ellison.—S. P. though parol proof was that testatrix declared her intention, that it should not pass. 2 Wms's Rep. 419. 421. Trin. 1727. by the Master of the Rolls. Nichols v. Osborn.

26. A wife (having authority to make a will) devised to her husband her gold watch and all the goods which she brought into his house, and decreed that such goods only passed as were then brought in not any brought in after; but that books, jewels, pictures and money did not pass. Hill. Vac. 1711. Dormer v. Bishop of Sarum.

27. All my personal estate at D. Per Cur. whatever personal estate testator had there at the time of his death will pass, as coaches, horses, and whatever he had there. 2 Vern. 688. pl. 613. Mich. 1714. Sayer v. Sayer.

For as to a personal estate which is always fluctuating and

changing, the instant of his death is the only time to ascertain it. Mich. 1714. Ch. Prec. 394.

S. C. — G. Equ. R. 88. S. C. — *So for arrears of rent issuing out of lands at D. and not elsewhere and due at testator's death they pass by those words.* G. Equ. R. 88. S. C. — Ch. Proc. 394 S. C. & S. P.

28. Ld. C. Cowper held, that the word *goods* passed a *bond*, and that the words seemed at common law to pass a bond, and to *extend to all the personal estate*: but this being in the case of a will, and a will relating to a personal estate too, it ought to be construed according to the rules of the civil law, and that the civil law makes *bona mobilia*, and *bona immobilia*, the *membra disidentia of all estates*. The *bona immobilia* are land, *bona mobilia* are all moveables, which must extend to bonds, and therefore by the devise of all testator's goods a bond must pass. Wms's Rep. 267. Mich. 1714. Anon.

29. Devise was of the *better part or more part of his goods*. Decreed that he gave no more than half, and nothing is intended but the first choice, and the *better half and more part* are synonymous terms. Hill. 1714. Canc. Werrington v. Cotterel.

30. A. devised to B. *the furniture of his house at C. yet goods intended to be sent to that house*, though every thing is prepared for their sending thither, as buying the goods, and carriers agreed with, and the goods packed up, will not pass. Decreed at the Rolls, and affirmed by the Ld. Chancellor. 2 Vern. 739. Hill. 1716. Duke of Beaufort v. Ld. Dundonald and Dutcheis of Beaufort.

Gilb. Equ. Rep. 172. Pasch. 8 Geo. 1. before the Lords Commissioners S. C. is a D. P.

31. A. devised to B. his wife, *all his plate, pictures, household goods and furniture, that shall be at his house at R. at the time of his decease*. A. goes beyond sea, and being there, his steward prevailed on the landlord of the house at R. to take a surrender of the lease and the goods are all removed to another house; after this an account of it being wrote to A. *A. approved of it*. These goods do not pass to the wife. But had they been removed by fraud to defeat the legacy, or by a tortious act *unknown to A.* the might have been relieved; per Cowper C. 2 Vern. 747. pl. 654. Hill. 1716. Earl of Shaftsbury v. Countess of Shaftsbury.

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32. By a devise of all a man's household goods, all the *household goods* which testator hath at the time of his death will pass, and because such are always changing and perishing, therefore the will as to the personal estate shall *relate to the time of testator's death*, or otherwise a man must make a new will every day; and as to plate if *commonly made use of by the family* the same shall pass as household goods. It was so held by the Master of the Rolls. Wms's Rep. 421. Pasch. 1711. Masters v. Sir H. Masters.

Wms's Rep. 651. pl. 185. S. C.

33. *I make my wife whole and sole executrix of all my personal estate, and my will is, that such part of my personal estate, as she shall leave of her subsistence shall return to my sister.* The interest of the personal estate was not sufficient to maintain the wife. Sir J. Jekyl Master of the Rolls, as agreeable to the intention of the testator and consistent with the rules of law, construed and understood it thus, (viz.) *I devise the use of my personal estate to my wife with a power to dispose of as much of the principal as shall be necessary for her subsistence, if the interest be not sufficient for that purpose, and his sister to have the residue.* And though the law by construction vests all the

the personal estate in the executor absolutely, yet it may be qualified by the declared intention of the testator; and an account was decreed accordingly. 10 Mod. 441. Trin. 5 Geo. Uphill and Halfey.

34. If a man devises his silver *tea-kettle and lamp, with the appurtenances*; nothing shall pass but the kettle and lamp, and the box wherein the lamp was placed, and not the silver tea-pot, milk-pot, tong, strainer, or canisters; resolved at the Rolls. Abr. Equ. Cases 201. Mich. 1728. Hunt v. Berkly.

35. A man devised to his niece all his *goods, chattels, household stuff, furniture, and other things*, which then were, or should be in his house at the time of his death, and sometime after died, leaving about 265*l.* in ready money in the house; and it was decreed, that this ready money did not pass; for by the words *other things shall* be intended things of like nature and species with those before mentioned. Abr. Equ. Cases 201. Mich. 1729. Trafford v. Berridge.

36. One *seised of lands in fee and possessed of a term for years in B. devises all his lands, tenements and real estate in A. and B. to J. S. and his heirs*; this will not pass the term, especially if there be another clause in the will which disposes of the personal estate. 3 Wms's Rep. 26. Hill. Vac. 1729. Davis v. Gibbs.

37. I devise all my *household goods, and other goods, plate, &c. to A. the residue of my personal estate to B.* the ready money and bonds do not pass by the word *goods*, for then the bequest of the residue would be void. 3 Wms's Rep. 112. Pasch. 1731. Woolcomb v. Woolcomb.

38. One by will gives all his *household goods and implements of household*. The *malt, hops, beer, ale, and other victuals* in the house do not pass, but the *clock, if not fixed to the house*, shall pass; but not the *guns or pistols*, if used as arms in riding, or shooting game. 3 Wms's Rep. 334. pl. 87. Trin. 1734. Slanning v. Style & al.

39. One devises *the sum of 6000*l.* South-sea-stock* to J. S. and the testator has but 5360*l.* no more than the 5360*l.* shall pass; and the rest of the testator's personal estate *not be obliged to make it up* 6000*l.* but it might be otherwise if *the testator had no stock at all* 3 Wms's Rep. 384. Mich. 1735. Ashton v. Ashton.

40. It is settled, that if there is a *limitation over of a personal estate, after that which would have been a plain vested estate tail, if it had been a real estate*, he that would have been intitled to have been tenant in tail, if it had been in case of a real estate, shall be intitled to the *absolute property* in the personal estate; so that it shall go to his representatives, and the limitation over will be absolutely void. But in the reason of the thing there seemed to him to be a great difference between such sorts of limitations, that are *vested ones*, and limitations of this sort, that are *contingent*. In those cases where they are vested, the party trusts to no event, and nothing is put as doubtful. *As if a personal estate is bequeathed to A. for life, the remainder to B. and the heirs male of his body, and B. is a person in esse, the remainder to C.* The whole remainder in that case

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is *vested* in B. and C. by no possibility can ever take any part of this estate. But where the limitation is in its creation a contingent one, the party trusts to the falling out of the contingency; and his lordship's present opinion was, that according to the event of that contingency the limitation over would be good or bad; namely, if that, which would have been a contingent remainder in tail, had it been in case of a real estate, becomes a vested one during the lives of any of the tenants for life, or if a posthumous child would have had the benefit of the remainder had it been within the statute K. Will. 3. then the remainder over would be bad; but if no such contingency happens, the remainder over will be good. *Barnard, Chan. Rep. 58, 59. Pasch. 1740. Per Ld. Chancellor in case of Gower v. Grosvenor.*

(Q. b. 2) What passes by what Words, where there are Freeholds and Chattles, or absolute Estates and Mortgages, though in Fee,

2 Chan. Cases 51. S. C. decreed accordingly.

1. A. Seised in fee of divers lands and having also lands mortgaged to him, devised all his lands to A. and his heirs. The mortgaged lands do not pass but go to the administrator, Vern. 3. Pasch. 33 Car. 2. *Wynn v. Littleton*,

—2 Vent.

351. Sir Thomas Littleton's case, Pasch. 33 Car. 2. in Canc. reports that Ld. Chancellor declared, that in such case the mortgage would pass. — Though *forfeited* do not pass. 2 Vern. 625. *Liton v. Strobe Russel & al.* — Nor though the equity of redemption is *foreclosed* or released afterwards, ut ante. — Ld. Chancellor declared that if a man had but the *trust* of a mortgage of lands in D. and had other lands in D. If he devised all his lands in D. the trust would pass. 2 Vent. 351. in Sir Thomas Littleton's case.

2 Vent. 351.

Littleton's case. S. C. decreed and says; that there were other circumstances in the will that seemed as if intended not to pass the mortgaged land [which is probably meant of the rent charge of 80l. per annum for life.] — 2 Ch. Cases 51. S. C. decreed that the mortgaged lands did not pass.

2. But if A. seised in fee of lands in mortgage to him in M. N. and O. and also seised in fee absolutely of other lands in M. P. and Q. (but the mortgaged lands were of the greatest value) devised to B. all his land in M. P. and Q. or elsewhere; the mortgaged lands in M. N. and O. will not pass, for the word (elsewhere) like an (&c.) will not fetch in a thing of a different nature and of a greater value, though they might fetch in small parcels of lands of like nature, and besides the will having charged 80l. per annum to issue out of all his lands for the life of J. S. it is not probable that he meant his mortgaged lands, which on redemption would create confusion. Vern. 3. Pasch. 33 Car. 2. *Winn v. Littleton*.

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3. One seised of a house in fee rented a barn and stable of Parker, which was in the occupation of Parker, together with another house and this he was tenant for eleven years; and then he bought the barn and stable and occupied it with his ancient house and then he purchases Parker's house. After this he makes his will and devises to his

His wife the *messuage* where he then dwelt, and the yards, gardens, and out-houses with all appurtenances thereunto belonging for life, and after to his son. And then he further gives to his wife all that *messuage* or tenement which he purchased of Parker, with the gardens and other appurtenances, as they are situate in B. in the tenure and occupation of A. B. C. &c. for her life, and after to his daughter; and the question upon a special verdict was, which of them should have the barn and stable. Holt argued that the barn and stable passed as part of the house in possession, because it is now become part of the house, for if one hath an house and purchase land to it and makes a garden and lays it to his house, though it were not originally belonging to his house, it is now become part of the messuage, being occupied together with it by one that had a permanent estate in the land, 2 Cro. 121, 122. and the using it and enjoying it together, is a sufficient reputation to make it pass for part of the house, all people will take it as part, and cited 6 Rep. 65, 1 Cro. 308. Sid. 190. His intent was, that the barn and stable should pass with the house to his son, for in this part of his will he saith, and all out-houses, so that though messuage in strictness of law will carry yards, back-sides, orchards, barns, stables, &c. yet he added out-houses to make his intention plain, and when he devises the other house he omits to say out-houses, but says in the tenure or occupation of A. B. &c. and the barn and stable were not in the tenure of A. B. &c. wherefore he prayed judgment for the plaintiff; it was argued for the defendant by Pollexfen, but the court were clearly of opinion against him, and adjudged for the plaintiff upon a special verdict. Skin. 187. pl. 3. Trin. 36 Car. 2. C. B. Anon.

4. I devise to J. B. all my right, title, and interest in those terms of years which I have in such a place, and also my house called the Bell-tavern, in which house the testator had a remainder in fee. Held in B. R. contra Holt Ch. J. that a fee passed in the Bell Tavern. Trin. 11 W. 3. B. R. Rot. 113. Moor v. Rawleson. This judgment was afterwards affirmed in the Exchequer Chamber.

5. I make my wife executrix, and give her the overplus of my estate. Per Blincow J. this will only give personal estate or chattels, 12 Mod. 593. Mich. 13 W. 3.

(R. b) What passes by the Limitation.

How much.

1. A. Seised in fee of a moiety in possession and a moiety in reversion, made his will in these words; I will that M. my wife shall have to her use and occupation, all that my living which I do now occupy so long as she do keep my name until such times as my son J. S. shall come to the age of 21 years, and that then she should have the thirds

*thirds of all my living. Item I will that my son J. S. shall have all my lands in C. and if he die without issue, then I devise the same to my daughter. The lives, on which the reversion was, die; M. enters and marries.** The question was, whether M. should have the third part of all, or but the third part of the moiety which A. had in possession, or no part, because she married before the full age of J. S. and so determined her own estate. It was resolved that she should have a third part of all; for the first words give all which was in A's possession (and that was a moiety) during the minority of the son, and if she kept his name (that is, if she lived so long a widow) by the words *all this my living which I now occupy*, and after marriage or full age that she should have the *thirds of all my living*, which extends to the reversion as well as possession; for it is not referred to that which he occupied, but it is to his living, and in common parlance his reversion is his living, and as if he had said, *all this farm*; and this devise to M. is *not controlled by the word subsequent*, he having no other farm or living; and though she determines her first estate by marriage, yet that does not destroy the subsequent devise. Cro. J. 649. pl. 18. Mich. 20 Jac. B. R. Rowland v. Doughty.

2. I devise 100 l. *per annum to my son A. and his wife for their respective lives; 60 l. whereof to be paid to the wife for the support of herself and her daughter, the remaining 40 l. to my son.* The son dies; his wife shall have the whole 100 l. *per annum.* 3 Wms's Rep. 121. Cowper v. Scott, & al'.

(S. b) What shall pass by Intendment of Devisor.

S. C. by Pemberton Ch. J. in delivering the opinion of the court in the case of Holms v. Meynel, and said it is a very strong case.—S. C. cited in S. C. by Raymond J. in his argument. Raym. 454.

See Remainder (F) pl. 3. and the note there.

1. **A.** Has two sons, B. and C. and devises part to his son B. in tail and part to C. and says, *if any of my sons die without issue, then the whole lands shall remain to a stranger in fee.* B. and C. enter accordingly. C. died without issue. He to whom the fee was devised entered. Adjudged that this entry was not lawful, and that the eldest son B. should have the land by *implicative devise.* 4 Le. 14. pl. 51. Mich. 32 Eliz. C. B. Anon.

Cro. E. 525. pl. 55. Soule v. Gerard. S. C. adjudged.—Noy. 64.

Garzard v. Soule. S. C. adjudged an estate tail in the son.—In such case B. shall take, cited 2 Vern. 377. as adjudged in the case of Jennings v. Hellier.—Per Holt Ch. J. according to 2 Vern. and denied Cro. 12 Mod. 277. Hill. 11 W. 3. in Hillier v. Jennings.

2. Devise to his son, *and if he dies without issue or before 21.* that it shall remain to B. The son has issue but dies before 21. Adjudged his issue shall have the land and not the remainder-man, and (or) there was construed for (and.) Mo. 422. pl. 590. Mich. 37 & 38 Eliz. Sowell v. Garret.

3. Devise of a term of years to a man and his heirs; adjudged that the devisee shall have the whole term, for though he cannot take it by the words of the will, according to a legal construction, yet since it appears, that the testator intended that the legatee should have what estate he had in the term, it shall go to him. 2 And. 17. pl. 10. in Case of Lowen v. Bedd.

4. *Clausula districtionis* is not sufficient in a grant to create a rent; otherwise in a devise. Mo. 592. pl. 798. Trin. 40 Eliz. C. B. Kingswell v. Cawdry.

Noy 71.
S. C. where
the words
were, *Idem*

visis a rent of 40 s. per annum out of all my lands in H. with a clause of distress, payable yearly at the usual fairs. Per Cur. this is a good devise of a rent-charge by these words, *with a clause of distress*; because of the intent of the devisor in giving of a remedy, and means to come to that rent-charge.

5. Where the intention is *secret* and not declared, the secret intent must give way to the legal intent. See Chan. Cases 239. Mich. 26 Car. 2. in Case of Cox v. Quantock. [305]

6. Devise is of *rent-charge for life out of a mortgage in fee*, the mortgage is *redeemed*. It was said that in such case every one should have part of the money *pro rata* according to their several interests. Vern. R. 4. Pasch. 33 Car. 2. in case of Winn v. Littleton.

Vern. R.
70. Brent
v. Best and
Barnish,
that tenant
for life

shall have one-third, and remainder-man two-thirds.

7. Devise to A. and B. *his daughters and their heirs, equally to be divided* between them; and *in case they happen to die without issue*, then he devised to F. a nephew. The two daughters having several estates by moieties, one of the daughters dies, her part remains to her sister by way of *cross remainder*. Raym. 452. Mich. 33 Car. 2. B. R. Holmes v. Meynel.

2 Jo. 173.
S. C. and B.
takes by
way of re-
mainder by
implication.
And by
Pemberton

Ch. J. in delivering the opinion of the court, the words (if they die without issue) cannot be construed otherwise without violence to the intention of the devisor; for then he gave all his lands to F. which imports that both shall come at one time, which cannot be till both the daughters are dead without issue, unless by the death of one without issue the other should lose her moiety, which cannot be thought to be the intention of the devisor. — Pollexf. 425. to 435. Maynell v. Read. S. C. adjudged a cross remainder between the daughters.

8. Devise to his wife of 600 l. *to be paid to A. in full for the purchase of such lands already settled on the wife for life for jointure*, the lands *were not settled*. Adjudged no devise of them. 3 Lev. 259. Trin. 1 W. & M. in C. B. Wright v. Wivel.

9. A. devises 100 l. to B. *and by will releases to B. all debts and demands, and afterwards A. lends B. 100 l.* Whether this 100 l. is released by the will? Per Cur. If the executor can recover it at law he may; we will not take away his remedy if any he hath, nor will give him any aid in equity; and therefore decreed payment of the legacy, and dismissed the cross bill. 2 Vern. 136. 137. in pl. 135. Pasch. 1690. Roberts v. Bennet.

10. *General words* in a will may be qualified by special words subsequent, and shall not be construed to subvert the intention of devisor explained by such subsequent words. See Skinn. 632. pl. 1. Hill. 7 W. 3. B. R. Dalby v. Champemoon.

11. One on ship-board intitled to part of a considerable *leasehold estate* by the death of his father, *which he knew not that he had*
any

any right to, made his will at sea, and devised to his mother (if living) his rings, and makes A. his executor, and devises to A. his red box and all things else not before bequeathed. This passes not the leasehold interest, or what the testator did not know he was intitled to, but shall not be restrained to such things as were on board the ship or things *ejusdem generis* with those abovementioned. And it is likewise considerable, that the executor was a mere stranger, whereas the testator had brothers and sisters, and the Master of the Rolls decreed him to be only as a trustee for them as to the surplus but with respect to the rings, &c. given to the mother, that they were lapsed legacies by her dying in testator's life-time, and should therefore fall to the executor. Wms's Rep. 302. Hill. 1715. Cook v. Oakley.

[306] 12. A. devised all his personal estate, and the produce thereof to B. and if B. dies within age and without issue, then he gives the personal estate to J. S. It was held by the Master of the Rolls that the interest money of what shall be made of the personal estate does in all events belong to B. and should be put out from time to time for his benefit; and if he die within age, and unmarried without issue, J. S. shall only have the principal money or capital. And upon appeal to Ld. C. Parker, his Lordship was of the same opinion. Wms's Rep. 500. Mich. 1718. Tiffen v. Tiffen.

13. A. by will directs, that B. shall continue to live at his house at C. and that H. the son of B. shall cohabit with B. there in the same manner as he then did with A. and that B. should be at the charge of house-keeping, servants-wages, and coach-horses to the number that A. maintained; and to enable B. so to do, A. directed 1200l. a year by quarterly payments to be paid to B. for her life, and that if H. marry and B. should think fit to live from him and to quit the house and furniture, then B. was to have 250l. a year for life. H. married. Lord C. Parker said, he admitted that H. might live at the house at C. with B. as he had done with A. but if he would live there with a greater number of servants or horses than were there in A's life-time, his Lordship thought that B. was not bound to maintain them, but was only to maintain him in the same plight and manner as A. did, and that there should be no abatement out of the 1200l. in case of A's absence any more than in case of his death. Wms's Rep. 600. 604. Hill. 1719. Blackburn v. Edgley.

14. A. devised that B. should continue to dwell in his house at C. and that H. her son should dwell there with her, and gave B. 1200l. a year annuity for the charge of house keeping, and in case H. should marry, and B. should think fit to live from him, and to quit the house and furniture, then B. was to have 250l. a year for life. Ld. C. Parker held, that the furniture of the house at C. is not to be sold while B. stays there; for the words above shew that she was to enjoy them until such time as she should quit the house and goods, But he said that the words are not strong enough to carry the goods as heir-looms with the house after B. should quit it or die, but then they shall be subject to the trusts of the will, Wms's Rep. 600. Hill. 1719. Blackburne v. Edgley.

15. A.

15. A. having a daughter his only child married to N. by whom she had three daughters, by will, after several devises of real and personal estate, gave the *residue of his real and personal estate to trustees, their heirs, executors and administrators, in trust to pay and apply the produce and interest thereof for the maintenance and benefit of such of his grand-children by his said daughter as should be living at the time of his decease, until they should be 21, without making any further disposition, except that he directed, that if all his trustees die, N. the father should be a trustee.* The question was, whether the grand-daughters by these words should have the surplus itself by these words, or that the same should be distributed among the next of kin, as to the personal estate and the real estate to descend to the heir at law, and the rather because a provision was made for them by the marriage settlement. *Ld. C. Macclesfield* held that the intention was most plain that the grand-children should have the surplus after they are 21, and said, that by the vesting it in trustees, all was given from the heir at law (the daughter) which A. would not have done, had he intended any thing to remain to her, and that to help this, the word (*produce*) shall be taken in the larger sense, and then will signify whatever the estate will yield by sale or otherwise, and that it cannot be intended that N. the husband and plaintiff, by being made trustee, was to be so for himself, or for what himself would be intitled to, should it come to his wife. 2 Wms's Rep. 194. Mich. 1723. *Newland v. Shephard.*

16. A person possessed of a term of years, and a fortune in money, made his will, and left all of his children pecuniary legacies payable at different times; and after the decease of his wife, he devised one moiety of the term to his son B. and the other moiety to his son F. and then came this clause, and if any of my children die before their portion becomes payable, then that to fall equally between my wife and the surviving children. B. died in the life of the wife; so the question was, whether his moiety of the term should be divided among the wife and surviving children? It was resolved, that as in common parlance portion is not said of a term, and there being pecuniary legacies on which it may operate, the word (payable) shall be applicable to and be confined to that; this contingency of his wife's dying might happen when the sons were very old, and long after the money became payable, and the sons, by this contingency hanging over them, could not dispose of their interest for the advantages, or perhaps the necessities of their families, which would therefore be to their prejudice, which could not be supposed to be done by a father. *Sel. Cases in Canc. in Ld. King's time.* 12, 13. Paich, 11 *Geo. Richards v. Cock.*

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(S. b. 2) What shall pass by Intendment of Devisor, where there are Words of Reference.

S. C. cited
by Gawdy,
3 Le. 167.
in pl. 218.
Hill. 29
Eliz.

1. **A** Man after the statute of 27 H. 8. devises *that his feoffees should stand seised to the use of A. in fee*, though there were no feoffees, nor could be any to his use, but the testator's intent was that A. should have the land, and so it was adjudged; cited by Anderson. Pl. C. 523. b. Hill. 20 Eliz. as Lingen's case.

Cro. J. 144.
145. pl. 4.
Molineux
v. Moli-
neux. Hill.
4 Jac. B. R.
the S. C.
and S. P.
resolved ac-
cordingly.
—S. C.

2. A man makes a grant of several rent-charges by several deeds for younger sons, and never executes it by livery, &c. and afterwards devises by his will that his younger children shall have the inheritances according to the several writings. Resolved that though the deeds and writings were not parcel or part of the will, but another matter, yet that reference being to the matter in the deed, is a good devise of the rent-charge within 32 H. 8. Noy. 117. Molineux's case.

cited by Noy. Arg. Palm. 136. as adjudged; and that this judgment was afterwards reversed, but not for the matter in law, but default in pleading. — Comyns's Rep. 460. Mich. 8 Geo. 2. in the Exchequer, it was admitted Arg. that where a deed is not effectual, and afterwards the testator by his will devises to the uses of the deed, the estate may pass by the will, though it shall not pass by the deed, as if the will devises with reference to a feoffment where no livery was, or to a bargain and sale where no enrolment was, or to a deed by which a fine is agreed to be levied to such uses, and no fine is levied, there the estate passes by the will, which has reference to the deed (as the case was Salk. 225.) although it could not otherwise pass, but no other estate shall pass, only such as would pass, if livery or enrolment had been made, or a fine levied.

3. Devise of all his lands to A. to his wife for life, and also his lands which he purchased of B. to his wife for life, and after the decease of his wife, he gave the said lands to one of his sons and his heirs. The question was, whether the son should have all the lands devised to the wife, or only those that were last mentioned? And it was adjudged in the grand sessions that all should pass. And upon error brought here it was agreed Arg. that if the will had said, "all the said lands to his son and his heirs," it would have extended to the whole; and it was said that this is the same, because indefinitum æquipollet universali. Et adjournatur. Vent. 368. Mich. 35 Car. 2. B. R. Gamage's case.

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Holt Ch. J.
concluded
that by
these ge-
neral words
Black,
Green and
White Acre
did not pass,
but that they
descended to
J. and K.
(the daugh-
ters of B.

4. A. seised in fee of lands in W. and Y. and other lands, and having issue two sons B. and C. upon B's marriage settles part of them to the use of B. for life, then to M. intended wife of B. for * life, then to B. in tail, remainder to B. in fee, and he settles Black, Green and White Acre to himself for life, then to B. for life, with a proviso to preserve contingent remainders, and then to first, &c. sons of B. in tail male; and in like manner to C. remainder to the right heirs of B. A. dies; B. has issue H. a son, and J. and K. daughters, and by will devised all his lands, tenements, hereditaments to trustees, to raise portions and maintenance for his daughters, and after, in case H. died without issue, he devised all his lands, &c. except L. L. and T. to J. his daughter in fee, and then he devised L. L. and

L. and T. to K. in fee, and then recited that *whereas he was seized of other lands, &c.* and in the end of his will takes notice, that *his father had requested that Black, Green and White Acre should go*, for want of issue male of B. and C. *to D.* their cousin, and that therefore he *devises* that it be observed, and requests C. his brother to act accordingly, and dies, and *H. and C. die without issue*, and Holt Ch. J. who declared the resolution of the court, held, that though B. had only a *dry reversion in Black, Green and White Acre*, yet it passed by the generality of the word (all his land, &c.) but in this case the exposition ought to be according to the *special words*, according to Altham's case, 8 Rep. otherwise special words would be rejected, and that (all his lands, &c.) ought to be expounded by the special words of recital (whereas he was seized of other lands, &c.) and also that *Black, Green and White Acre*, could not be comprised within the words, *all his lands, &c.* for all the lands which he gave to his trustees for raising portions, he gave after the portions raised to the same trustees to the use (as to all but L. L. and T.) ut supra, now Black, Green and White Acre cannot pass to the trustees by this devise; for *B. was but tenant for life of Black, Green and White Acre, and on his death went to H.* his son, and so did not intend more to go to his daughters than he could devise to his trustees, and the *recital of his father's request* at the end of the will, declared fully his intent, and that the court ought not to adjudge such general words contrary to such intent. Skin. 631. Hill. 7 W. 3. B. R. Dalby v. Champnoon.

and sisters of H.) and gave judgment accordingly for the defendant; [so that it seems they were as excepted out of the will, and not devised at all, by reason of the special words.] Ibid. 633.

(S. b. 3) What shall be said Accumulative Legacies or Devises.

1. A Rent charge was devised to the wife in lieu of jointure and dower, and an *implicit devise of the lands to her by the same will*. Decreed she shall only have the rent charge. 2 Chan. Rep. 63. 23 Car. 2. Kemp v. Kemp.

2. C. by her will gave the plaintiffs 100 l. a-piece, and afterwards, by a codicil annexed to her will, gave the plaintiffs 100 l. a-piece. This court with the judges, on reading the said will and codicil, were of opinion and satisfied, that the said legacies in the said will and codicil mentioned, are not one and the same, but distinct and several legacies of 200 l. and decreed the defendants to pay the same to the plaintiffs. 2 Chan. Rep. 70. 24 Car. 2. Wallop v. Hewett.

3. A. bequeathed 1000 l. to every after-born child; afterwards a son is born. A. adds a clause with his own hand, appointing his executor to raise 4000 l. out of the profits of such an estate for the portion and benefit of his little infant (as he called him) and afterwards declared he had left the plaintiff (the after-born son) 5000 l. and decreed accordingly, though it was objected the construction would be very strange to have *one portion as a child born, and another*

ther as a child unborn. Fin. Rep. 267. Mich. 28 Car. 2. Windham v. Windham.

4. A. devises 300 l. to the child he shall have at his death. Afterwards A. has three children. He makes a codicil, and gives to each 200 l. a-piece. The devise being without words signifying the same to be of their portions, and there being nothing one way or other to revoke or affirm the former gift of 300 l. it shall be taken by way of accumulation, and the children shall have both legacies. Chan. Cafes. 301. Mich. 28 Car. 2. Pit v. Pidgeon.

5. The husband devised 1000 l. to his wife, and about five years after he wrote a codicil, reciting that he had given her 1000 l. by his will; and by that codicil he gave her 1600 l. decreed she shall have that sum, and not both. Fin. Chan. Rep. 290. Hill. 29 Car. 2. London (Mayor) v. Ruffel, & al'.

6. Baron devises his goods and 1000 l. to his wife, and afterwards by a codicil reciting his having by his will given her 1000 l. he now gave her 1600 l. and whatsoever was in his former will, and that his former will should stand in force, notwithstanding this codicil. Decreed that, besides the goods, the wife should only have 1600 l. Fin. Rep. 290. Hill. 29 Car. 2. Governors of the London Hospitals v. Ruffel, Gouge, & al'.

7. Devise was by will to B. of 500 l. and after by a codicil annexed to and made part of her will, she says, I give to B. 500 l. in silver; and then, after two legacies given to two other persons, she devised to C. (to whom she had given by her will a jewel) 100 l. more than I have given her by my will. Decreed that B. have 1000 l. and the executors to pay it at a day certain, and if they failed to pay it on that day, then to pay interest for it from that time. Fin. Rep. 294. Pasch. 29 Car. 2. Newport v. Kinston and Lawton.

2 Chan.
Rep. 110.
S. C. de-
creed ac-
cordingly.

(T. b). Who shall take by wrong, or imperfect, or uncertain Description of the Person.

1. A Man has issue two daughters, Amy and Agnes, and by continuance Amy was called Agnes; the father devised to his daughter called Agnes, and adjudged that Amy shall have the legacy, because Amy was called Agnes, and the other is Agnes in truth, and is not capable by the name of his daughter called Agnes. Mo. 230. cites 5 E. 3.

2. A. devised land to the wife of J. S. J. S. dies, she takes to Baron J. D. A. dies, she shall take the land, and yet at the death of A. she is not the wife of J. S. but of J. D. Arg. Pl. C. 344. b. Trin. 10 Eliz. in case of Brett v. Rigden.

3. A devise was made to the Major Chamberlain, and governors of the hospital of St. Bartholomew; whereas they were incorporated by another name, yet the devise held good by Dyer, Weston and Manwood, for it shall be taken according to the intent of the devisor. Ow. 35. Mich. 13 & 14 Eliz. Anon.

4. Devise

4. Devise to *A.* eldest son of *B.* where *his name is C.* yet *C.* shall take, because there is sufficient certainty; per Weston. 3 Le. 18. pl. 44. Hill. 14 Eliz. C. B. Ow. 35. 14
Eliz. S. P.
—Dal.
78. pl. 8.

S. P. by Weston in totidem verbis, and seems to be same case. —Ow. 35. by Weston. S. C. and S. P. because the other words do make a sufficient certainty. —Fin. Rep. 403. Hill. 31 Car. 2. Pittcairne * v. Brace, & al. S. P. accordingly. —Ibid. Marg. says, that it is in the civil law; as for instance, where the testator devised lands or tenements by a wrong name, if this mistake appears otherwise by circumstances, so that the will of the testator may be sufficiently known, the legacy shall have its effect, though the true name is mistaken; cites Domat 1 vol. 54.

6. If I have two sons named *J.* and I devise my lands or limit a remainder to *J.* my son; the law will construe this devise to extend to *J.* my younger son, for without devise or limitation my eldest son should have it. But if a stranger hath two sons known by the name of *A.* and I devise lands to *A.* son of the stranger there I ought to explain my meaning openly. Per Southcote J. 2 Le. 217. Pasch. 16 Eliz. B. R. in Humphreston's case.

7. Grandfather, father and son, the father dies, and the son gives lands to his father and his heirs, the grandfather shall have it; because the son so called him. Arg. 4 Le. 74. pl. 162. Hill. 29 Eliz. C. B.

8. *A.* hath issue two sons, both named *John*, and conceiving his eldest son to be dead, he deviseth his lands by his will to his son *John* generally, when in truth the eldest son is living; in this case, the younger son may alledge and give in evidence the devise to him, and may produce witness to prove the intent of the father; and if no proof can be made, the devise shall be void for the uncertainty. Per Anderson and Wray Ch. J. resolved. 5 Rep. 68. b. Mich. 34. Eliz. in the court of wards, in Cheyney's case.

9. Grandfather has a daughter, the daughter has a son, the grandfather devises to his son where it was his daughter's son, yet it was good. Per Newdigate J. 2 Sid. 149. cites 39 Eliz.

10 Three brothers of one father and mother, the middle brother seised of land devisable, giveth it by his testament *propinquiori fratri suo*; it seems that none of them shall take. Dyer's reading on the statutes of wills 5. cap. 3. s. 5.

11. If a man seised of land devisable in fee has two sons and one daughter, which daughter has issue two daughters, and devises his land to a stranger for life, the remainder unto his two sons for life, the remainder unto the next of blood of his child, the deviser dies, and the mother, of the two daughters dies, the stranger dies, the eldest son dies without issue, the second does thereof infeoff a stranger with warranty, upon whom the two daughters do enter, and the seoffee puts them out, and they bring an assise, the assise will well lie. Perk. S. 508.

12. If a man hath only two sons which are both called *Thomas*, and he gives his lands to *Thomas* it shall be intended his youngest son, because his eldest son should have it by descent, and this a good will. Per Cur. 1 Brownl. 132. Trin. 6 Jac. in the case of *Pacy v. Knolls*.

13. *A.* seised of land in fee has four sisters, one has issue and dies, he devised his land to all his sisters or their heirs equally to be divided.

The issue of the sister that died in the life of A. shall take nothing, and *or* shall be construed *and*. Arg. 2 Sid. 54. cites Trin. 1 Car. Rot. 189. Taylor v. Hoskins.

14. If A. B. and C. being aliens and brothers A. has issue a son, and B. and C. are naturalized and B. purchases lands, and devises them to the heir of his brother A. and his heirs; and B. dies, leaving A. and his son, the devise is void, for the uncertainty who is intended thereby; for A. being an alien, can have no heir; or however, being living, can have none during his life; but *per Glyn Ch. J.* if it had been found that the son of A. was the reputed heir of A. though A. was an alien, yet his son might have taken by this devise. Eq. Ab. 213. pl. 9. cites 2 Sid. 23. 51. Trin. 1656. Foster and Ramsfey.

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2 Freem.
Rep. 158.

15. Devise to younger children. The heir having a good estate of inheritance, though a younger child shall not take. 3 Chan. Rep. 1. 12 Car. 2. Bretton v. Bretton.

pl. (204. b.) Britton v. Britton. S. C. accordingly. — 1 Chan. Rep. 224. 14 Car. 2. Mead v. Cave. S. P. — Nelf. Chan. Rep. 63. S. C. Bretton v. Bretton. — S. P. N. Ch. Rep. 133. Mich. 1691. Admitted on all sides. James v. Fleetwood, in case of a settlement.

16. W. C. by will, devised to every one of his servants living with him at the time of his death, 10 l. a-piece, and the plaintiff was servant to the testator at his death, so the plaintiff's suit is for the 10 l. legacy. The defendant insists, that the plaintiff was not servant to the said C. at his death, or lived with him as a servant, but the plaintiff at the testator's death, and long before and after, was the servant of M. B. the testator's mother. This court was satisfied, that the plaintiff was a servant to the testator, and intrusted in his house-keeping, and employed in washing his linnen, and tended him in his sickness; and therefore decreed the defendant the executor to pay the plaintiff her 10 l. legacy. 2 Chan. Rep. 101. 26 Car. 2. Feake v. Brandsby.

17. Lands devised to the poor of the city of R. decreed that the poor of the precincts and liberties shall have a share. Fin. R. 193. Hill. 27 Car. 2. Attorney General on behalf of St. Margaret and Strowd parishes in Rochester v. Mayor and Citizens of Rochester.

18. A devise was to Margaret the daughter of W. K. The daughter's name was Margery. The question was, whether Margery should take; and held that she should; quia constat de persona. Freem. Rep. 293. pl. 344. Trin 1677. Gynes v. Kembley.

19. Money was devised to be distributed annually among the poor of the parish of L. in the county of M. whereas there was no such parish in the county, but in the county of D. there was. The court held that since there was such a parish, in the county of D. the testator must mean that parish, because it appeared that he was born there, and that both he and his parents lived and died in that parish. Fin. R. 395. 30 Car. 2. Owen v. Bean.

20. A. devised the residue of his estate among his kindred, according to their most need, this shall be construed according to the

So where
the devise
was to his

act.

act for better settling intestates estates. 2 Chan. Rep. 146. 30 *poor relation, without saying.*
Car. 2. Carr v. Bedford.

what, the *Countess* of Winchelsea being as near a relation as any claimed a share; and decreed that she is *intituled*, in regard the word *poor* is frequently used as a term of indearment and companion, rather than to signify an indigent person, as one speaking of his father, my *poor* father, or of his child, says, my *poor* child. Wms's Rep. 327. Trin. 1716, at the Rolls anon.—But the reporter says that this seemed a strained construction in favour of the Earl and *Countess*, who had not an estate proportionable to their quality.

21. *Grandson* may take by the name of *son*, if the testator did use to call him by the name of his son. Per Raymond J. Raym. 412. Mich. 32 Car. 2. B. R. in case of Stead v. Berrier.

22. A. by his will gives 100 l. a-piece to *all his servants*; none but such as were servants to A. before the making the said will and did so continue to be servants to him till the time of his death could have any pretence to the said legacy, and such as were his menial servants and lived all along in the house with him, from before the making of the will to the time of his death were intitled to the legacies. 2 Chan. Rep. 363. 1 Jac. 2. Jones & al. v. Henley.

23. A. possessed of a great personal estate bequeaths to B. his brother 150 l. and to the sons and daughters of his brother and sister not mentioning them by name 10000 l. to be equally divided between them and the surplus to be distributed among his brothers and sisters children and grandchildren, and the rest of his *poor kindred according to his executor's directions*; decreed, the rest of the *poor kindred* to be construed according to the act for distributing intestates estates, and no further, and to be distributed in such shares and proportions as the executors in their discretion should think fit. 2 Chan. Rep. 395. 2 Jac. 2. Griffith v. Jones.

24. A. devised 15 l. a-piece to each of his relations of his fathers and mother's side, and made B. executor and C. residuary legatee. B. paid 15 l. to M. one of A's cousin germans, and likewise 5 l. a-piece to her four children and allowed good; per Ld. Wright. 2 Vern. 381. Q. 20, 1700. Jones v. Beale.

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H. by his will gave 500 l. to the relations of E. H. to be divided equally be-

tween them. E. H. had at the testator's death two brothers living, and several nephews and nieces by another brother. It was said, that in the case of Brown v. Brown, my Lord Macclesfield had determined that the word *relations* should be confined to such relations as were within the statute of distributions, because of the uncertainty of the word *relations*; and upon this authority my Ld. King determined, that no relations should take by this description that could not take by the statute of distributions. Cases in Equ. in Ld. Talbot's time. 251. Mich. 1734. Thomas v. Hole.

25. A's wife being *ensient* at the time of making his will, bequeaths 500 l. to his *posthumous child*. Afterwards a daughter is born and then A. dies; per Lord Somers she is a posthumous child within the meaning of the will and well intitled to the 500 l. Ch. Prec. 177. 1701. Jaggard v. Jaggard.

26. A devise of goods was made to A. for life, and after his decease to the *posterity* of T. B. and the question was, whether by the virtue of word (*posterity*) only descendents from the body of T. B. should take (viz.) children and grandchildren, or whether he having no issue, it should go to the collateral relations? The Lord Keeper was of opinion, that it went only to the issue of the
A a—B b 2 body.

body. 2 Freem. Rep. 268. pl. 336. Mich. 1703. Attorney General v. Bamfield.

6 Mod.
199. S. C. &
P. Per
Holt Ch. J.
944. suit
conceal-
sion. —

27. Devise to *A. B. father and son are named A. B. prima facie A. B. the father shall be intended; but if devisor did not know the father it will go to the son.* Per Holt. Ch. J. 1 Salk. 7. Hill. 2 Ann. B. R. in case of Lepiot v. Brown.

28. Stewards of courts and such as are not obliged to spend their whole time with their master are not within the intention of the will; but Ld. Keeper said, he would not narrow it to such servants only as lived in testator's house, or had diet from him; this was on the Duke of Bolton's will, which was to *all his servants living with him at his decease.* 2 Vern. 546. P. 1706. Towns- end v. Windham and Robinson.

It seems
that the
will was
all of the
testatrix's
own writ-
ing.

29. A. by will gave a legacy of 200 l. to *Mrs Sawyer* when *there was no such person ever known to her*, but it was alledged that *she meant one Mrs. Swopper.* The Master of the Rolls ordered the master to examine who the testatrix meant thereby, and whether she meant Mrs. Swopper who contended for the same, and if he should find that she was the person intended, then she to receive her legacy. Wms's Rep. 421. 525. Pasch. 1718. Masters v. Sir Harcourt Masters.

30. A. lived in Canterbury many years and died there, and *gave to the poor of two hospitals in Canterbury (naming them) 5 l. a-piece*, and afterwards by a codicil gave 5 l. a year to *all and every the hospitals, (without saying where the hospitals were.)* It was held by the Master of the Rolls that A. having lived in Canterbury many years, and died there, and taking notice by her will of two Canterbury hospitals, this charity was not void for the uncertainty, but to have been intended *for all the hospitals in Canterbury*; but not to extend (as was pressed) to the hospital about a mile out of Canterbury, though founded by the same Arch-bishop, and governed by the same statutes. And the court did the rather confine the general words (all hospitals) to those in Canterbury, because these charities, if they prevailed, would be perpetuities of 5 l. a year, and by that means create a deficiency, and defeat the rest of the will as to plain legacies, in favour of those that were doubtful. Wms's Rep. 421. 425. Pasch. 1718. Masters v. Masters.

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31. A legacy of 500 l. *was given to one by the name of Catherine Earnley.* This legacy was claimed by *Gertrude Yardley*, and not by any person of the name of Catherine Earnley. It was proved that the testator's voice when he made his will, was very low and hardly intelligible; that the testator usually called the legatee of this 500 l. *Gatty*, which the scrivener, who took instructions for drawing the will might easily mistake *Katy*, and that the said scrivener not well understanding who this legatee of the 500 l. was, or what was her name, the testator directed him to J. S. and his wife to inform him further, who afterwards declared that *Gertrude Yardley* was the person intended. It was moreover proved, that the testator in his life-time had declared, that he would do well for her by his will. At another day, his honour gave

gave his opinion, that the legacy was a good legacy to Gertrude Yardley, though the same was given by the will to Katherine Earnley. It is true, *if this had been a grant, nay, had it been a devise of land, it had been void*, by reason of the mistake both of christian and surname. 2 Wms's Rep. 141. 142. Pasch. 1723. in case of Beaumont v. Fell.

32. A. seised of a church lease for life devised an annuity out of it to B. for life, and directed that if J. S. the cestui que vie should die, his executor should purchase the leasehold premises in the name of C. his kinsman, and that his executor out of the surplus of the leasehold and personal estate, should keep the premises in repair; but if he could not make such purchase, then he devised the surplus of the estate to W. R. the plaintiff, and made D. his executor in trust, only giving him a small legacy. The executor purchased the leasehold for the life of C. Ld. C. King held, that W. R. residuary legatee could not have this lease, being on a contingency, which never happened, the purchase having been made, and decreed it to C. whom testator in the devising clause named his kinsman. But afterwards on a re-hearing his lordship reversed his former decree, and held that the plaintiff W. R. was intitled to the lease. Hill. 1725. and 6 July, 1726. 2 Wms's Rep. 323. Stephens v. Stephens.

33. John Brooke being possessed of a considerable personal estate, and having a wife, and one daughter who was married to the defendant Thomas Taylor, made his will, bearing date the 4th day of May 1720, in the words following, viz. John Brooks, citizen and founder of London, doth revoke all other wills, and acknowledge this to be my last will. I do give to my dear wife all my worldly goods, house at Islington, stock, money, bonds, notes in the East India or elsewhere, and ninety-nine years annuity in the Exchequer, with all the profits which may come upon them or by them, with this condition, to give to my three sisters 5*l.* yearly for their lives, or the longest liver, presently after my decease, if God permits you to continue in this capacity, not else, and after my wife's decease, the same I give to my sisters and then after my daughter's decease to the fruit of her body. But for want of such issue or fruit, to my brothers and sisters then living, and after them to their children, and the children of my brother Richard now deceased, except a note of 50*l.* in Mr. Taylor's hands, and goods and plate that I give to him. And I do nominate and appoint my brother Phillip, brother William, and Mr. Taylor to be my executors to see my will performed. Where I have set my hand and seal the 4th of May, 1720. In November 1721 the testator died, and the defendant Thomas proved the will, and possessed the personal estate. 25th Jan. 1726 Mary Taylor the daughter died without issue, leaving her husband Thomas Taylor. Upon the 30th Jan. 1726. the widow died, having first made her will, and Thomas Taylor executor who has proved the will, and has also taken out letters of administration to Mary his wife. The plaintiffs are all the testator's brothers and sisters that were living at the

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death of both the widow and the daughter. The question was, whether the subsequent limitations after the want of issue of the said daughter's body, or any, and which of them (the wife and daughter of the said John Brooks being dead without issue) are good, and to whom the said estate does belong.

We are of opinion that the wife of John Brooke being dead, and Mary his daughter being also dead, without issue living at her death, the subsequent limitations are good, and that the estate in question belongs to the plaintiffs.

R. Raymond.

F. Page.

Jam. Reynolds.

E. Probyn.

Cafe from Lord Chancellor, and decreed accordingly. MS.
Rep. Brooks v. Taylor.

(U. b) Who shall take by Name of Heir ; One who is, or is not, Really Heir.

Devise to his heir male and held good, though he was neither heir of the body, nor

heir at law, because it appeared by other words in the will that the testator did not intend he should be hindered from taking by his heir female. Cited per Cowper C. 2 Vern. 736. as adjudged Trin. 8 Annæ in C. B. Rot. 1884.

Cited per Cowper C. 2 Vern. 736. in case of New-comen v. Barkham. —Holt Ch. J. in the case of Aynsworth (alias Ford) v. Ld. Ossulston, Mich. 7 Ann. B. R. MS. Rep. seemed not to allow the authority of this case, and said, that he did not take this to be so.

1. LAND devised to his executors till they have raised 1000l. and after wills that *his heir male shall have*, and dies, *having issue a daughter*. Executors levy 1000l. the brother cannot enter, because he ought to be heir at common law, who shall take this, and not heir special. Palm. 50. cites 1 Rep. 103. b. [Palsch. 21 Eliz. in Shelley's case.]

2. A. taking notice in his will that B. his brother (who was dead) had a son, and that he himself had three daughters, who were his right and immediate heirs, he gave them 2000l. and gave his *land to the son of his brother by the name of his heir male*, provided if his daughters troubled his heir, then the devise of the 2000l. to them should be void. Resolved, that the deviser taking notice that the others were his heirs, the limitation to his brother's son, by the name of heir male, was a good name of purchase, and this agrees with Counten and Clerk's case, in Hob. 30. Per Hale Ch. J. cites it as of 16 or 26 Eliz. Vent. 381. in case of Pibus v. Mitford.

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The daughter shall have this land, and not the uncle; for

3. A man having *issue a son and a daughter*, devises lands to his son by the words *that after his decease the lands should come to the son*, but appointed that *certain friends should receive the profits until his son came to 24*. Provided that *if the son should happen to die without issue male of his body lawfully begotten*, then he willed that *the lands should go to the right heirs males, and posterity of me and*

~~my name for ever~~; equally to be divided to and amongst them; the devisor dies, the son dies without issue, the daughter marries and has two daughters. Per cur. the brother of the testator shall not have the lands by this limitation, but the party must be right heir, as well heir male or female. Mo. 860. pl. 1181. Hill. 11 Jac. C. B. Cownden v. Clerk.

the right heir male, who is the devisee in this case, ought to be a purchaser, and

ought to be heir male, and the brother is male, but he is not heir: and this is a new form of inheritance, if the brother should have this land, and should have a daughter, who has a son in the life of his grandfather, or afterwards; the fee upon the death of the grandfather should be an abeyance, during the life of the daughter, if the estate should be allowed. Judged and affirmed in error. Jenk. 294. pl. 52. cites Hob. 29. 10 Jac. Cownden's case.

4. A man may be heir *ex vi testamenti* before he is heir *ex vi doni*, as if A. devised that *B. shall be his heir*. C. devised lands to A. and his heirs, B. shall have those lands as heir to A. Arg. Mich. 1657. 2 Sid. 27. B. R.

5. And for default of such issue I gave the remainder of my said estate to the heirs male of the body of *J. L.* lawfully begotten; *E. L.* happens to be living at the time of the remainder taking place, yet the heir apparent shall take. MS. Tab. May 27, 1714. Darbison v. Beaumont.

6. A. devised land in trust after debts paid, to convey to the heir male of the body of *B. A's great-grandfather*; C. is heir male of the body of B. and D. is heir general, the being the daughter of an elder brother. Per Cowper C. decreed the trustees to convey to C. as C. would be well intitled to take as heir male by descent, so he is sufficiently described to take by purchase. 2 Vern. 729. Hill. 1716. Newcomen v. Barkham.

7. If A. devises all his lands to his heirs in borough-English, or to his heirs in gavelkind, such a special heir will take, though not heir general at common law. Per Cowper C. 2 Vern. 732. Hill. 1716. in case of Newcomen v. Barkham.

8. Devise to the heir male of *J. S. now living*; adjudged a good devise, because the person is well described. Per Cowper C. 2 Vern. R. 734. Hill. 1716. in the case of Newcomen v. Barkham, cites Pollexf. 457. and 2 Vent. 311. the case of James v. Richardson.

2 Lev. 232, Mich. 30 Car. 2. the S. C. adjudged, but that judgment reversed

reversed in the Exchequer Chamber for the matter in law, but in the House of Lords the judgment in the Exchequer was reversed, and the judgment in B. R. affirmed.

(W. b) Who shall take by the Words Heir, Issue, Heirs Male, &c.

1. **NOTE** per Newton J. if a man devises his land to *J. N. and his heirs females of his body begotten*, and dies, and after the devisee had issue a son and a daughter, and dies, the daughter shall have the land, and not the son, though he be heir at the common law; for this is a tail to the heirs females. Br. Devise, [316] pl. 37. cites 9 H. 6. 23.

2. Where a man gives land to *J. S. and his heirs males of his body, &c. who has issue a daughter, who has issue a son, and dies*, the land shall revert to the donor, and the son of the daughter shall not have it; but *contra* of such devise, by reason of the will of the devisor; for there the son of the daughter shall have it. Br. Devise, pl. 29. cites 30 H. 8.

3. A. devises his land to *his right heirs males, having only a daughter*; this devise is void; for such devisee is a purchaser. But otherwise it is if *A. devises to B. and his heirs males, and A. dies, and afterwards B. there is an intail vested in B.* Jenk. 294. pl. 42.

4. *Issue* includes all, and is nomen collectivum, and an estate for life of a term devised to *A. and after to the issue of A. and for want of issue of A. to B.* was lately adjudged in *B. R.* to be a good remainder to B. but reversed in *Cam. Scacc.* on error brought, and a difference taken between such limitation to children and to the issue, and cited * *PEARS and REEVES's* case in point; per *Ld. Keeper*. 2 Chan. Cases 210. Mich. 27 Car. 2.

5. A. devised lands to *B. during his life* if he be living at the death of devisor, *but if he die before devisor*, then he gives them to *C. the eldest son of B. for life* if he be living. But if *C. be dead* then he devised them to *the next heir male of C.* (in the singular number) and for default to *the next heir male of the body*, and for default then to the next heir male of his name then living, &c. so as the land should continue in his name. *B. survived A. and after died*, having issue, *C. the defendant, M. and N. were nieces and heirs of A.* It was argued that the intent of the will is plain that the nieces should not take, and then insisted that the clause (and for default of such issue, then to the heir male of B. begotten) is not under any contingency, but stands absolutely, and is a good limitation of the remainder, and after *B's* death take effect in *C. the defendant*, and the words (*heir male*, and for default of such issue, &c.) is of the same sense as heirs male, and he thought if the limitation had been in feoffment to uses the contingent should not extend to the heirs male of the body of *B.* though it should to *C.* and afterwards the court was of opinion that *C.* had an estate by the devise, and judgment was given quod quer. nil capiat per billam. 2 Jo. 111. Trin. 30 Car. 2. *B. R.* Gold v. Goddard.

6. A. devised in this manner; *I give to my eldest heir male and his heirs males for ever, all my lands in such a place, and if there be a female, she to have 12 l. per annum as long as she lives; the testator had two sons, the eldest of which died in his life-time, leaving issue a daughter*, and it was adjudged that the lands should go to the second son and not to the daughter of the eldest, though she was heir general. Abr. Equ. Cases 214. Trin. 3 W. 3. *C. B.* Rot. 1484. *Baker v. Hall.*

7. Devise to *E. A. for life, and if he should have any issue, then to such issue and their heirs.* *E. A. has issue two sons*; per *Treby Ch. J.* the eldest will take a fee; but *Powell J.* held, that both will take, because issue is nomen collectivum, and it would not have been void for uncertainty. *Ld. Raym. Rep.* 206. Pasch. 9 W. 3.

8. Devise

• Pollexf.
119. cites
S. C. as
Mich. 13
Car. 2. in
Canc.

8. Devise to the issue of B. B. had then a daughter and a son born after testator's death. Per Ld. Keeper all the children shall take, even grand-children, but they shall take only estate for life; and though the devise is to the issue begotten that makes no difference, the words begotten and to be begotten are the same as well on the construction of wills as settlements, and take in all the issues begotten after, and if a child is born after testator's death, the estate shall open and take * in such after-born child; but if the devise be of a personal estate to B. and his children, there a child born after testator's death shall not take. 2 Vern. 545. Pasch. 176. Cook v. Cook.

Devise of land *ex test* suo devifor had a son and a daughter. Adjudged that the daughter shall take nothing & And. 134. Anon. Hill. 42 Eliz.— 2 Le. 55. Lovelace's case. S. C.

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9. Devise to the issue of A. and for want of such issue to B. A. having a son and a daughter, they shall take as persons described and have only estate for life; per Ld. Keeper. 2 Vern. 546. Pasch. 1706. in case of Cook v. Cook.

Cro. E. 742. pl. 19. Hill. 42 Eliz. C. B. testator had 2 sons and 2

daughters, and devised his land to his issue, and 10 l. a-piece to his daughters, the daughters take no part of the land. Taylor v. Sayer. — 2 And. 134. pl. 81. S. P. and seems to be S. C.

10. A devise was to A. with several remainders, and a remainder over to the heirs male of the devifor. The devifor had no heir male of his body at his death. It was held a void limitation and a collateral male cannot take by this devise. In the King's case a grant to heir male is void, but in that of a common person it is a fee, and the word male is idle, but heirs male, &c. in a will are always intended of the body, and implies an estate tail. Q. 11 Mod. 189. pl. 3. Mich. 7 Ann. B. R. Ford v. Offulston.

3 Salk. 336. Ld. Offulston's case S. C. a devise of a remainder to his right heirs males must be intended right heirs males of his

body, and no collateral heirs males shall take by such a limitation by way of remainder.

11. Devise to B. his heir male though B. is neither heir of the body or heir at law to the devifor, yet held good, because by other words in the will it appears that testator did intend B. should not be hindered from taking by his heir female; cited per Cowper C. 2 Vern. 736. Trin. 8 Ann. C. B. Rot. 1884. in case of Newcomen v. Barkham.

12. A. devises lands in trust after debts paid, to convey the premises to the heirs male of the body of B. the testator's great grandfather, C. is the heir male of the body of B. but not heir general, there being a daughter of an elder brother who is heir general; yet the trustees shall convey to C. as C. would be well intitled to take as heir male by descent, so is he sufficiently described to take by purchase. Chan. Prec. 461. pl. 294. Hill. 1716. in case of Brown v. Barkham.

Ibid. 589. S. C. cited. — G. Equ. R. 116. 131. S. C. — 2 Wms's Rep. 3. S. C. cited by Ld. Chancellor Pasch. 1722.

in the case of Dawes v. Ferrars, and a distinction taken by him between these two cases, which see at the plea following.

13. One devises to his wife for life, remainder to his grand-daughter, who was heir at law for life, remainder to his own heirs male; a nephew although he be next heir male, cannot take by virtue

2 Wms's Rep. 1. S. C. accordingly. —

As to the virtue of this last limitation, not having both parts of the description verified in him. Chan. Prec. 589. pl. 353. Pasch. 1722. *Dawes v. Ferrars.*

BROWN v. BARKHAM, which was cited in this case, the Ld. Chancellor said, that that was merely of a trust; but the principal case is that of a legal estate where the rule of law that has so long prevailed and been taken for granted must be observed, viz. that he who claims as heir male by purchase, must be heir as well as heir male. Besides this differed from the case of *Brown v. Barkham*, the remainder being limited to the heirs male of the body of Sir Robert Barkham the grandfather; whereas here the devise was to the heirs male, without saying of any body; wherefore allow the demurrer. 2 Wms's Rep. 3. — Ibid. at the end of Fol. 2. is a note, that there is now (Mich. 1739.) [the time of publishing that volume] a bill of review pending to reverse that decree. — And accordingly I find by a MS. Rep. that this case was upon the will of Griffith Dawes, who devised, as in the principal case mentioned, to his grand-daughter the Lady Eliz. Bulkeley, remainder to his own heirs males. A bill of review was afterwards brought to reverse this decree, in which Dorothea Gwyn, Priscilla Gwyn, and Elizabeth Williams infants, by their next friend were plaintiffs, and John Hooke, Esq; defendant, where the case appeared to be, that in 1729, the Lady Bulkeley intermarried with the defendant John Hooke, Esq; but before their intermarriage, by indentures of lease and release, dated the 18th and 19th days of November 1729, she the said Lady Bulkeley did grant and convey the said premises to a trustee to the use of herself till the said intended marriage,* and then to the use of the defendant and Lady Bulkeley for their lives and the life of the longer liver of them, and after the decease of the survivor, then to the use of the defendant, his heirs and assigns for ever.

Lady Bulkeley died without issue 8th May 1736, and thereupon the defendant John Hooke entered on the said capital messuage called Banjeston, and other the real estate of the said Griffith Dawes.

16th May 1738, the plaintiffs, the three great grand children and heirs at law of Francis Dawes the brother of the said Griffith Dawes by their next friend brought their bill in the high court of Chancery against the defendant John Hooke, stating the will of the said Griffith Dawes and their pedigree as above, and praying, among other things, to be let into possession of the said premises.

The defendant by this answer made title to the premises by virtue of and under the said indentures of lease and release, dated the 18th and 19th of November 1729, made on his marriage with Lady Bulkeley, whereby the premises were conveyed as aforesaid to the use of Lady Bulkeley till the marriage, and then to the use of the defendant and Lady Bulkeley for their lives and the life of the longer liver of them, and after the decease of the survivor of them, then to the use of him the said defendant John Hooke, his heirs and assigns for ever.

18th November 1740. The cause was heard before the Lord Chancellor, when his lordship was pleased to order, That a case should be made for the opinion of the court of King's Bench, and that the following question should be stated thereon, viz.

“Whether by virtue of the will of the said Griffith Dawes, dated 12th November 1693, the plaintiffs are intitled to the estate in question?”

Copy of the opinion of the Judges of the Court of King's Bench.

Upon hearing counsel on both sides, and consideration of this case, we are of opinion, That the plaintiffs are not intitled to the estate in question by virtue of the will of the said Griffith Dawes, dated 12th November 1693, for we conceive that Francis, the brother of the testator, under whom the plaintiffs claim, could not take by the description of right heir male of the testator.

Gwyn and Hooke, February 1st, 1743.

W. Lee.
Wm. Chapple.
M. Wright.
T. Denison.

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(X. b) Who shall take by the Word Children.

1. *MOTHER* devised her goods to her children; she has issue a bastard and other children. The bastard shall take with the others; for though in case of others he is nullius filius, yet he is clearly known to be the child of the mother. Mo. 10. pl. 39. Hill. 4 E. 6. Anon.

2. Devise to his daughters; devisor dies, leaving two daughters, another daughter is born. Adjudged that the third shall take with the other two, otherwise if the two daughters had been named by their proper names. Mo. 220. pl. 358. Mich. 27 & 28 Eliz. B. R. Stanley v. Baker.

Show. 26.
S. C. cited
Arg.

3. A. had issue B. C. D. and E. and devised to his wife for life, and after her death to C. his son in tail, and if he dies without issue, then to his children. B. had issue a son and died, and then C. died without issue. Resolved that the son of B. shall not take as one of the children of A. Per Hale Ch. J. Vent. 229, 230. cites Mich. 34 Eliz. B. R. Tyler's case.

S. C. cited
per Ld. Ch.
J. Parker,
in deliver-
ing the
judgment
of the court.
10 Mod.

369. in case of Woodright v. Wright.

4. Devise to baron and feme, and after their death to their children, or the remainder to their children; in this case, though they have no child at the time, yet every child which they shall have after may take by way of remainder according to the rule of law, for this intent appears, that their children shall not take immediately, but after the death of baron and feme. 6 Rep. 17. b. Hill. 41 Eliz. B. R. Wild's case, alias Richardson v. Yardley.

But if there
had been
no child living
at the time
it would
have been
an estate
tail. Arg.
cites Wild's
case, 8 Mod.

957. in case of Shaw v. Way.

5. Grandmother devises land to her daughter J. S. whereas she is her grand-daughter, yet this is good; because in common speaking she is so called. Owen 88. per Walmisley.

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S. P. Vent.
341. in case
of Stead v. Berrier.

6. If land be given to a woman for life, remainder to her eldest issue, a bastard, though eldest, shall not take, for general words shall be taken in digniori sensu. Arg. Bridgm. 15.

7. A. made his will, and having four children living, devised his land after the death of his wife to come among his children equally, supposing his wife to be with child, devised a house for the maintenance of such child. A. further willed, that if all his children died before 21, then the premises devised to his children shall go over. All the children die before 21, except the posthumous. Decreed that the lands shall go to the posthumous child, and not to those in remainder. Chan. Rep. 76. 10 Car. 1. Marsh v. Kirby.

8. J. S.

8. J. S. having a child born; A. devised to two of the children of J. S. *begotten, or to be begotten* the sum of 100l. a-piece to be paid at their several ages of twenty-one, the that was born at the time of the will shall come in for 100l. though there were two born after. Chan. Rep. 188. 12 Car. 2. Plumpton v. Plumpton.

9. *Money given in trust for the children of J. S. shall be for the benefit only of such children as J. S. then had, and not of such as shall be born afterward.* 2 Ch. R. 69. 24 Car. 2. Warren v. Johnson.

10. A. has two sisters and bequeathed 300 l. *to each of my sisters B. and C's children, and if any of them die before the money be paid, then the money which should have been paid to such child, shall be divided between the grand-children of my said sisters, the said legacy to be paid before any other; B. had five children, three of which died in the life of A. and left children; yet those children's children cannot take but the money shall be divided between the surviving children of B.* Fin. R. 182. Mich. 26 Car. 2. Judd v. Arnold.

N. Ch. R.
73. S. C.
but there it
is a devise in
remainder
to such of
the children

11. A devise to such of the children of A. viz. B. C. and D. as shall be living at the death of E. is but an estate for life to the children, and adjudged that in that case the word children extended to grand children. 3 Ch. R. 86. 19 June 1675. Edwards v. Allen.

of A. B. C. and D. as shall, &c. and decreed as above, and there was cited a decree made 4 Car. 2. wherein it was adjudged an estate for life only in the case of Taylor v. Hedges.

12. A. devised lands to be *equally divided between B. C. and D.* his three nieces and heirs at law, *and such of their children as are, or should be living, &c.* B. had four children. C. died, so that her legacy was lapsed; D. had one child, the two surviving nieces and the five children shall take in equal proportions during their lives, and when any of the children die the share or shares of such dying shall remain to B. and D. as *coparceners* and their respective heirs. Fin. R. 214. Trin. 27 Car. 2. Edwards v. Allen & al'.

But the
court agreed
that if a man
living no son
but a grand-
son devises his
lands to his
son, the

13. A. devised a manor to the eldest son of B. in fee and other land to J. S. *for life, remainder to such of B's children, as shall be then alive and owners of the manor.* Resolved if such son be dead when J. dies, the *grand child* of B. shall not take, because it is not within the words. Per Raymond J. Raym. 411. Mich. 32 Car. 2. B. R. in case of Stead v. Berrier, cites Cro. E. 357.

grandson may take. But in the principal case the lands were devised to the son, and a legacy was left to the grandson by the name of grandson; and the son dying in the life of the devisor, he made a codicil and devised away part of the lands devised before to the son to a stranger, and after declared by parol, that his intention was, that his grandson should have his lands which his son should have had, so that the son and grandson being so distinguished it is impossible to understand the grandson meant by the name of son; and held that neither the republication nor parol declaration could operate as a devise to the grandson. Vent. 341. Trin. 31 Car. 2. B. R. Stead v. Berrier.

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14. A. devised the residue of his personal estate to be divided among his four children B. C. D. and E. and then devised his *real estate to be sold for increase of his children's portions; after the will*

will *another child is born*, that child shall come in for a share of the money of the real estate, but not for any of the residue of the personal estate, that being devised to the others by name. 2 Chan. Rep. 210. 32 Car. 2. Coles v. Hancock.

15. A. being a widower *settles land to raise* 100l. per annum for his eldest son, and 100l. a-piece for his younger children, such children as he may afterwards have by another wife will be equally intitled with those he had at the time of the settlement. Vern. 334-Mich. 1 Jac. 2. Braithwait v. Braithwait.

16. Devise of 1500l. in trust *for such children of A. as B. should advise*. B. died not giving any advice, and at B's death there was only one child living, but at the testator's death, there were five other children living, who all died intestate, but some of them left children. Jefferies C. decreed, the 1500l. to be divided between the child living at B's death, and the children's children as were living at the death of B. 2 Vern. 50. pl. 49. Pasch. 1688. Crook v. Brooking.

17. But on appeal before the commissioners they decreed that the only child living at B's death should have the whole 1500l. and thought the *grandchildren* cannot take by the name of children where there are children; but had there been no children they might. 2 Vern. R. 106. pl. 105. Trin. 1689. Crook v. Brooking.

18. A. devised 200l. to purchase lands to be settled on B. and the heirs of her body, and if B. die without issue *then the children of C. to have it* (or words to that effect) so that it appears not by the will, whether A. intended that the children should have the lands as jointenants or tenants in common. B. died without issue. The trustees afterwards purchase land with the 200l. and settle it on D. and E. the two then living children of C. and their heirs; D. has issue and dies; the court would not help the issue of D. against E. who claimed all by *survivorship*; for the Chancellor said he would not make it a breach of trust in the trustees that they did make this a *joint purchase*, there being nothing in the will to direct them otherwise. But if the money had remained in their hands, he seemed to be of opinion that the children of D. should have had a *moiety*; for where *money is given to two* (being personal estate) it shall be *several* to them. 3 Ch. R. 214. Pasch. 1688. Sanders v. Ballard.

19. Devise of 20l. a-piece *to all the children of A. a child born after the making the will and before the testator's death shall take*; per Commissioners. 2 Vern. 105. pl. 103. Trin. 1689. Garbland v. Mayott.

2 Freeman.
Rep. 105.
pl. 116. S.
C. cited by
the name of
Garberond
v. Garberond.

20. A man devised *a term for years to his daughter and her children, (she then having three children) and also to such other children as she should have, and the children of those children, she having other children afterwards*, but the question was, whether they should have any shares, and it was held that the woman and her
three

three children took jointly each a fourth part; and that the after-born children took nothing; and that these words were words of limitation, and not of purchase, and it is as much for the wife's part, as though it had been * given to her and the heirs of her body. 2 Freem. Rep. 186. pl. 262. Mich. 1692. Alcock v. Ellen.

21. A child born after testator's death shall not take, where the devise is of a *personal estate*, for it vested on the death of testator and shall not be devested. Per Ld. Keeper. 2 Vern. 545. Pasch. 1706. in case of Cook v. Cook.

22. Devise to B. and his children, if B. has children they take with him, but if he has none it is an estate tail. Per Ld. Keeper. 2 Vern. 545. Pasch. 1706. in case of Cook v. Cook.

6 Rep. 17.
Wild's case
alias Ri-
chardson v.
Yardley—
Jenk. 264. pl. 66.—So to the *men children of his body*. Rep. 30. cited per Richardson Ch. J.
Diet. R. 347.

23. Devise of all the rest of his estate *to and amongst his grand-children living at his death*; per Cowper C. they are restrictive words, and can be of no other use; otherwise if the devise had been to his *grand children*; and decreed for the grand-children living at the testator's death, and excluded those *born after*. 2 Vern. 710. pl. 632. Hill. 1715. Musgrave v. Parry, & al.

G. Eqh. R.
136. S. C.
and P.
Pasch.
1716.—
Wms's Rep.
342. Hill.
1716. S. C. and P.

24. A devise to all his children and grand-children, extends only to those *in esse at the time of the will made*, unless these were future words, as all his children and grand-children *which should be born or living at his death*. Agreed per council and court. Ch. Proc. 470. Pasch. 1717. Northey v. Burbage.

25. A. devised 3000l. *to all the natural children of B. his son by J. S. Ld. C. Parker inclined that a natural child in ventre sa mere could not take, for that a bastard cannot take until he has got a name of reputation of being such a one's child, and that reputation cannot be gained before the child is born.* Wms's Rep. 530. Hill. 1718. Metham v. Duke of Devon.

26. A. has B. a nephew, and C. a niece; A. makes his will, and devised land to B. and C. *for their lives, remainder to the children of the said B. and to the children of the said C.* C. had then one child. A. after made a codicil, at which time C. had two more children. This devise is as a future devise, and takes in the children *after born*, for the word children in the will, extends to more than the child born at the making the will. 9 Mod. 104. Mich. 11 Geo. Bateman v. Roach.

(X. b. 2) Take by the Word Children, &c.
How.

1. A. Devised the surplus of his estate to B. C. and D. his brothers, and the children of his brother E. equally to be divided: Whether the children of E. shall severally take an equal share with B. C. and D. or only a fourth part among them? 2 Vern. 653. pl. 581. Pasch. 1710. Bretton v. Lethulier.

2. A. by deed in his life-time settled lands to such uses as he should appoint, and in default of such appointment, to his five daughters and their heirs; afterwards A. by will appointed an estate for life only to four of the five daughters that were to take the fee; for want of the appointment it was objected by the court, that if a fee passes not by the will, but an estate for life only, yet the reversion, passed by the deed. But it was answered, that the appointment by will shewed the testator's intent that they should not take a fee, and was an implicit appointment of a fee to the heir; which objection being agreed to be significant, a day was appointed to argue it. Vern. 85. pl. 74. Mich. 1682. Bovey v. Smith.

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3. A. devised an estate to trustees to settle on B. and the heirs of his body, taking special care in such settlement that it never be in B's power to dock the intail of the estate given as aforesaid during his life. Decreed B. should be only tenant for life without impeachment of waste. 2 Vern. 526. pl. 475. Mich. 1705. Leonard v. Ld. Suffex.

This is not an estate executed, but executory. Ibid.

4. A. devised his personal estate to the children of B. and C. Neither B. or C. had any child at the making the will, or at the death of A. Per Cur. it shall be intended an executory devise, and to be such children as they, or either of them, should at any time after have, and they to take *per capita*, and not *per stirpes*, they claiming in their own right, and not as representing their parents, 2 Vern. 705. pl. 627. Mich. 1715. Weld v. Bradbury.

5. A. had five children, B. C. D. E. and F. of whom C. was dead, leaving children, and A. by his will bequeaths the residue of his personal estate equally to B. and to C's children, to D. and to E. and F's children.—F. was living, and was married to J. S. who had been twice a bankrupt, and therefore A. by his will had made some provision for her separate use. It seems by what was mentioned by the Attorney General, and not denied by the other side, that all the sons and daughters of A. had portions given them before by A. in his life-time, so that this was additional. Ld. C. King seemed at first inclinable that the children should take *per stirpes* only; but at length decreed, that B. and the children of C. and D. and E. and the children of F. (being in all 14 of them) should each take *per capita*, as if all the grand children had been named by their respective names; and that the children of F. could not take according to the

the statute of distributions, or in allusion thereto, forasmuch as F. the daughter was living, and so her children could not represent her; and that to determine it otherwise, would be going too much out of the will, and contrary to the words, when testator's meaning might be according to his words, and that meaning a reasonable and sensible one. 2 Wms's Rep. 383. Mich. 1726. Blackler v. Webb.

6. Devise to B. and the heirs male of his body, viz. to the first son of the said B. and the heirs male of the body of such first son, &c. This is only an estate for life. Gibb. 112. pl. 14. Mich. 3 Geo. 2, B. R. Law v. Davis.

7. H. by his will gave 500l. to the relations of E. H. to be divided equally between them. E. H. had at the testator's death two brothers living, and several nephews and nieces by another brother. Ld. T. determined that as the testator had directed the 500l. to be divided equally among them, he could not direct an unequal distribution, and accordingly decreed them to take *per capita*. Cases in Equ. in Ld. Talbot's time. 251. Mich. 1734. Thomas v. Hole.

(X. b. 3.) Who shall take, and What, by the Word Survivor.

1. I make A. my wife and B. my daughter, my executrixes of all my goods, moveable and immoveable, equally to be divided between them; Per tot. Cur. these words amount to a legacy to them. Catalin and Wray held that they were tenants in common. Southcote, that they were jointenants, because the words refer to a division to be made, and in the mean time they are jointenants. Dal. 90. pl. 10. anno 15 Eliz. Anon.

2. A. has three sons, and devises to the eldest Black-Acre, to the second White-Acre, to the third Green-Acre; and in case any of my sons die without issue, that the survivor be each others heir. The eldest dies without issue; the court conceived that both shan't take, the word survivor being in the singular number. Le. 166. pl. 230. Mich. 30 and 31 Eliz. C. B. Hambleden v. Hambleden.

Survivor shall be construed in the plural number. Resolved 3 Le. 262. pl. 352. Mich. 32 Eliz. C. B.

——Savil 92. S. C. but no judgment. ——Cro. E. 163. S. C. adjudged that they were all jointenants, and so is the meaning of the will. ——And. 38. pl. 100. Anon. S. C. but states it in the plural number, viz. to be divided among the survivors. ——Gouldsb. 100. pl. 4. S. C. Day was given over to argue it. ——Ow. 25. S. C. adjudged that all the survivors shall be each others heir, and so the remainders shall be to every one of them. ——And. 194. in pl. 229. cites S. C. to be adjudged accordingly.

3. A. has two sons B. and C. and devises part to his son B. in tail, and part to C. and says, if any of my sons die without issue, then the whole land shall remain to a stranger in fee; B. and C. enter accordingly; C. died without issue; he to whom the fee was devised entered. Adjudged that his entry was not lawful, and that the eldest son B. should have the land by implicative devise. 4 Le. 14. pl. 51. Mich. 32 Eliz. C. B. Anon.

4. A. hath three daughters, and deviseth to them 300 l. a piece, to be paid at the age of 21 years, or day of marriage, which should first happen, and if either of them should die before the said times, then her portion to be equally divided between the survivors; the eldest marries and hath her portion, and dies, leaving issue; the youngest dies before she either is married, or attains the said age of 21; the second survives. Resolved per Ellis, Windham and Dom' Cancellor, that the second sister should have the whole; and tho' it was objected, that the words (equally to be divided) did imply that they should be sharers, yet that is to be understood reddendo singula singulis in case two of them had survived. Freem. Rep. 301, 302. pl. 365. Mich. 1673. Anon.

5. Devise of 1500 l. to A. to be paid when he shall attain 21, to B. the same, so to C. and to D. and in case one or more of them die before, then his or their legacy, &c. to be divided among the survivors. B. died in the life of the testator, yet B's legacy shall go to the survivors. 2 Vern. 207. pl. 192. Hill. 1690. Miller v. Warren.

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6. A. devised a house to his sons B. and C. in equal moieties, and other houses to his other children in like manner, and adds, but my will is, that if any of my said children shall die before 21, or unmarried, the part or share of him or her so dying shall go over to the survivors; per Holt Ch. J. and decreed accordingly, if any of the children die unmarried after their age of 21, his share shall go to the survivor; but such survivor shall have only an *estate for life* in such share; and if B. die, by which C. has a share of B's part, and then C. dies that which went over to C. on B's death, *shan't go over again* a second time. 2 Vern. 388. pl. 356. Mich. 1700. Woodward v. Glasbrook.

7. A. Copyholder for his own life procured a copy in reversion to be granted to B. C. and D. for their lives successive, but this was in trust for A. and his heirs; A. by will devises the copyhold after the decease of him and B. his wife to the heirs of his body on B. if such issue shall be living at the decease of him, his wife, or survivor, remainder to J. S. A. left issue living at his decease, but such issue died living B. per Wright K. the word *survivor* must not be rejected, and the word (*or*) must be expounded (*and*) living at the decease of the survivor; and so held the remainder to J. S. good. But if that point had been otherwise, yet J. S. had been well intituled as *heir at law* to A. and decreed it accordingly. 2 Vern. 388. pl. 357. Mich. 1700. Nichols v. Tolley, & al'.

(Y. b) Who shall take by the Words of the Limitation.

* Br. Done, &c. pl. 21. cites S. C. — Br. Devise, pl. 17. cites 30 Aff. 4. S. P. — Dyer's Reading on the Stat. of Wills. 7 cap. 3. l. 23. S. P. accordingly.

1. A. Had two sons B. and C. and a daughter D. and devised lands to J. S. for life, the *remainder propinquieribus de sanguine puerorum* of A. The sons having no children, but D. having two daughters, neither the sons nor the daughters can take, for they are pueri, and not de sanguine puerorum, but the two daughters of D. shall take for their lives; and if there were also sons of sons or daughters, they should all take together, and children born after the remainder vested (which was after the death of A.) take nothing, and the nearest of degree in blood shall take, and the worthiest in order of descent; for the words import no respect of dignity, but of proximity of blood. Hob. 33. in case of Counten v. Clark, Hobart Ch: J. cites 30 Aff. 47. and 30 E. 3. 27.

2. Per Babbington if land be devised to the college of D. and there is none such at the time, but after such corporation is made, the devise is void, because there was no such in *rerum natura* at the time, &c. Br. Devise, pl. 5. cites 9 H. 6. 23.

3. A man deviseth to his wife for 10 years, remainder to his youngest son (he having a daughter) and to his heirs for ever, and if either of his sons shall die without issue of his body begotten, remainder to the daughter and her heirs in fee; the younger sons die without issue

issue in vita testatoris; upon a question whether the eldest son should have the lands in tail or fee by intendment, or the daughter, it was held the daughter should have them. D. 122. a. pl. 20. Mich. 2 & 3 Ph. and M. Anon.

4. A. has three brothers, B. C. and D. and devises his *house in possession of J. S. to his three brothers among them, and his house in B's possession to B. and he to pay R. W. 5 l. to find him schooling, or else to remain to the house, provided the house shall not be sold, but go to the next of the name and blood that are males.* A. dies; afterwards B. dies without issue; C. enters and dies, leaving issue a son; per three justices the son of C. shall have the remainder, and this in tail to him and the heirs males of his body, &c. remainder to D. in like manner; and also the first house devised to the three among them shall be so also in tail in every one of the parts. And the proviso against alienation proves the intention to make it a tail. And the words (or else to remain to the house) viz. family, shall be intended to the chief *and most worthy and eldest person of the family, &c. And the words (*that are males*) shall be construed in the future tense. D. 333. b. pl. 29. Pasch. 16 Eliz. Chapman's case.

If Land be devised to a *stock or family*, or *house*, it shall be understood of the heir principal of the house; for where the case is doubtful, the law shall prevail; per Hobart Ch. J. Hob. 33. cites it as Chapman's case.

5. A. B. and C. three brothers; A. has issue and dies; B. purchases land, and devises the same *to his son in tail*, and if he die without issue, that it shall remain to the lineage of the father; the son of A. the eldest brother shall have the land, and not C. the younger brother. Per Dyer. 4 Le. 206. pl. 331. Mich. 21 Eliz. C. B. Anon.

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6. A. seised of land in fee, had issue two sons B. and C. and devised that *if his son B. die before issue, so that the land descend to my son C. then I will that my overseers shall have the government of my lands, and of my son C.* B. married and died, leaving his wife young with child with a daughter; deviser died; the daughter was born. Adjudged that by this devise the daughter was excluded from the inheritance, and that C. should have the land. 4 Le. 32. 26 Eliz. B. R. Anon.

7. Devise to *second son in tail, and for default, &c. to the heirs of the body of his eldest son, and if he die without issue, then to his two daughters in fee*; second son dies without issue living the eldest, who has a son. The daughters shall have the land, notwithstanding witnesses swore that the deviser declared his meaning, that as long as his eldest son had issue of his body, the daughters should not have the land. 2 Le. 70. pl. 94. 29 Eliz. Chaloner v. Bowyer.

The reason was that the eldest son was living when the remainder should have vested in the heir of his body, which it

could not do during his father's life; for *Nemo est heres viventis* and during his father's life, he was no more heir male than he was heir female; per Ld. Cowper. Ch. Prec. 462. Hill. 1716. in case of Brown v. Barkham.

8. Ejectione Firmæ. Upon special Verdict the case was J. S. *had issue three sons, and devised his lands to his second son for 30 years to perform his will and pay his debts, and made him his executor, and if he dies within the 30 years, that then his third son shall have such term as shall be arrear of the 30 years, and dies; the eldest son dies*

without issue, and the inheritance descends to the second son, he dies within the 30 years, having issue; the question was between the uncle and the nephew, if the third son shall have the land during the residue of the 30 years? and it was argued by Pigott for the plaintiff, and Beamont for the defendant, and adjudged for the uncle plaintiff; for although the term was extinct in the second son, yet this is a new devise to the third son, for the words are, that he shall have such a term, &c. Cro. E. 128. pl. 1. Hill. 31 Eliz. in Scacc. Lowe v. Lowe.

Mo. 340.
S. C. and P.

9. Use limited to *executors*; he makes but one *executor*; there is no one that can take. 2 And. 93. Mich. 32 and 33 Eliz. Sir Moile Finch v. Bodyll.

Cro. E. 357.
pl. 17. S. C.
adjudged.

10. Devise *maner de M. seniori filio cujusdam Richardi Foster* his cousin, & *haeredibus suis*, and after devised his manor *de N. to Mary Walter for life, and if she die, and then any of my cousin Foster's sons living, then I will my said manor of N. to him that shall have my manor of M.* Foster had issue George and John; George and Mary enter; George dies without issue; John enters into M. and aliens it in fee. Mary dies John living; John shan't have the manor of N. because he had not the manor of M. at the death of Mary, and so was no such person as might take by the will. And. 306. pl. 315. Trin. 36 Eliz. Brown v. Peafe.

Ibid. 576.
Jobson's
case. S. C.
and saysthat
she should
take if she
was unmar-
ried at the
death of the
devisor,

11. A. has a nephew and a niece, who are his next of kin, and he devised his lands to his nephew in tail; *remainder to the next of kin of his name.* The testator dies without issue; if the *niece has lost her * name by marriage*, she can't take, but it shall go to the next heir male of the name; but if she was a maiden at her brother's death, she should take. Cro. E. 532. pl. 64. Mich. 38 and 39 Eliz. in Scacc. Bon v. Smith.

though she had been married at the death of her brother.

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12. A. devised lands in N. *in tail, the remainder to the next of kin of his name; at the time of the devise the next of kin was his brother's daughter, who was then married to J. S.* The devisor died, the tenant in tail died without issue. Adjudged the daughter should not have the land, for she is not now of the name of the devisor, but of her husband's name. Cro. E. 576. pl. 23. Trin. 39 Eliz. in B. R. Jobson's case.

13. A. had issue five sons B. C. D. E. and F. C. had issue Mary, A. devised to B. all his lands in tail, viz. *to him and the heirs male of his body*, and if he die without heirs male of his body, then he devised one part of the said land, (naming it) to C. and the heirs male of his body, and so the other son several parts and severally to the heir male of their bodies, and then follows, *so that my very will is, that none shall have my lands before mentioned but the heirs male of my body, and their heirs male of their body; and I further will, that if all the heirs male of my aforesaid son die and be spent, then I will that John Sibil, &c. shall have all my lands to him, and to their heirs male, &c.* All the sons die but D. Per the two Ch. J. the land is entailed to every son, and Mary the daughter of C. shall

shall have nothing, but D. shall take. 2 And. 195. pl. 13. in the court of wards. Sibill's case.

14. *I give to A. and B. my term for 60 years for their lives, and afterwards to such persons as shall remain in my house at N. at the time of their decease*; it was a question whether one who was in possession as tenant at sufferance at the death of the survivor of A. and B. shall be said to be in possession to have benefit of this remainder? but little was spoken thereto, et adjournatur. Cro. J. 198. pl. 26. Mich. 5 Jac. B. R. Mallet v. Sackford.

15. A. having eight daughters by three several venters, devised his land to his two youngest daughters by the last venter for life, the remainder *proximo consanguinitatis & sanguinis* of the deviser; youngest daughter dies, leaving issue. Per one J. the eldest daughter alone shall have the remainder. Per two J. all the daughters together shall take the remainder. Palm. 11. Trin. 17 Jac. B. R. Periman v. Biford.

But all three justices (Lea Ch. J. being absent) gave judgment for the issue of the eldest daughter, though they

differed in their reasons. Palm. 204. Periman v. Pierce. — Devise to A. remainder to him that is next of blood. A person *attainted* may take by this devise; per Doderidge and Haughton J. 2 Roll. R. 256. in case of Perin v. Pearce. — Bridgm. 14. S. C. argued but no judgment.

16. A. seised of land in fee makes feoffment in fee to his use, and after makes his will, by which he devised that the feoffees shall make estate of the same lands to all his sons except H. and if all his sons die without issue, then the remainder to a stranger. Hutton said, that because H. was not excepted in the last clause he had estate tail. Het. 57. Mich. 3 Car. C. B. Harris v. Marre.

17. Devise in trust for his daughter for life, remainder to the second son of her body in tail male, and so to every younger son with remainder over, and says the reason of his limiting it thus was because he thought the eldest would be well provided for. She had a son B. who died at a year old; after his death, C. another son was born; C. though now the eldest, yet being the second by birth, shall *take according to the will, though not according to the intention, and not to be excluded. Per Cowper C. 2 Vern. 660. Trin. 1710. Trafford v. Sir Ralph Ashton.

S. C. cited 3 Wms's Rep. 179. Hill. 1732. in the case of Lomax v. Holmeden, where the court held that a devise to my son A. for life, remainder to

the first son in tail male, remainder to his 2d. 3d. 4th. and 5th sons successively, without saying for what estate, or any words tantamount; and A. has two sons, the former of whom dies in his life-time; the second son shall have an estate tail, being the first son at his father's death. *Quære*, for the reason of that case seems rather against this construction, which is at least better warranted by the case of Chadwick v. Doleman.

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(Y. b. 2) Description. Who shall take. By Disjunctive Words.

S. C. cited Arg. 2. Sid. 54. but states it as a devise to sisters, and that it was adjudged that the issue of such sister as died in life of the devisor, shall take nothing, and that the words sisters (or) their heirs shall be construed sisters (and) their heirs.

1. **A.** Having four daughters B. C. D. and E. B. had issue N. and died. A. devised his land to his wife for life, and after her decease then equally *to be divided amongst his daughters or their heirs*; A. died; the wife died; the court was of opinion that it was strongest for N. to have it by reason of the word (or) in the disjunctive, for they said if it was (and) it would give the fee to C. D. and E. and not give B's heir a fourth part, but being (or) there is more colour that she shall take a fourth part by force of the devise. Adjournatur. Godb. 363. pl. 435. Mich. 1 Car. B. R. Taylor v. Hodgskins.

2. A. devised money in trust for such of her daughters, or daughters children, as should be living at her son's death. Some of the daughters were living at the son's death, and had also children, and others were dead leaving children. The Master of the Rolls decreed that *all the children, as well of the living as of the dead daughters, shall come in for their shares*. For the word (or) shall be taken for (and) otherwise the whole devise will be void for the uncertainty. And that it was the same as if the devise had been to such of my daughters and their children as shall be living at my son's death. Wms's Rep. 434. Pasch. 1718. Richardson v. Spragg.

3. So if the devise had been *to my children and grand-children*, my children and grand-children would have taken. Per the Master of the Rolls. Ut sup.

(Z. b) Limitation.

Who shall take by it, being made to Things, and not to Persons.

1. **A.** Devises *Ecclesiæ Sancti Andreae*, it is a good devise to the parson of the church, per Gawdy. Owen. 89. cites 21 R. 2. Devise 27.

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2. A. by will gave 500*l.* to his wife for life, remainder *to the parish church of St. Helens, London*, (which is an impropriation). The Master of the Rolls decreed that this should not go to the vicar or stipendiary of the church, but did belong to the churchwardens for the reparations of the church, and improving and adorning

adorning the same; and ordered that the same be applied accordingly. 2 Wms's Rep. 125. Hill. 1722. Attorney General v. Ruper.

(A. c) Who shall take.

By Relation to Testator's Death.

1. **GOODS** devised to A. for life, and after the death of A. to the heir of B. B. dies in the life of A. decreed that the goods should go to him that was the heir of B. at his death, and not to him who was the heir at the death of A. Vern. 35. pl. 34. Hill. 1681. Danvers v. the Earl of Clarendon.

2. 500*l.* to A. 500*l.* to B. 500*l.* to C. &c. and if any die, then his or her legacy, and also the residue of my personal estate shall go to such of them as shall be then living. Per Cur. these words must refer to a certain time, and that is when the legacies become payable, which is at the time of the testator's death, so that the death of any of the legatees afterwards, would not carry it to the survivors. Ch. Prec. 78. pl. 68. Mich. 1687. Trotter v. Williams.

(B. c) Relation. Where the Bequest shall relate to the Time of making the Will, or to the Testator's Death.

1. **I** F I devise all the goods which I now have in such a room, and after I put in other goods they shall pass. Arg. but Hok Ch. J. asked how it would be if the devisee put in other goods? to which Broderick answered, that he would say nothing to that, but that it might be a fraud. Holt's Rep. 244. admitted per Sir Edward Worthey of the other side, and cited Swinb. 418. Ibid. 249
Arg.

2. A man devised all the arrears now due, and unjustly detained from me the dean and chapter of York, to be employed in a certain charity; and the question was, Whether the arrears incurred after the making of the will, and a small time before the death of the testator, and which were never demanded by the testator, should pass; and per Lord Keeper not; for though a general devise of all a man's goods will carry all he had at his death, though purchased after the making his will; yet here it is confined to the arrears due at the making the will. Decreed. Abr. Equ. Cases 201. Trin. 1701. Attorney General v. Bury.

3. A. devised lands to his younger sons at their respective ages of 24, but that his eldest son should take the rents and profits till their said several ages. A. died, and then the eldest son by will gives all those rents and profits of the lands to his younger brother, but not to be paid them

them till 24, and died. The Master of the Rolls decreed that the rents * and profits devised by the eldest son, were to commence only as from his, and not from A's death. And affirmed on appeal by C. Parker. Wms's Rep. 500. Mich. 1718. Tiffen v. Tiffen.

4. A. devised *his library of books now in the custody of B. to All-Souls-College in Oxford, and in the same will he devised 4000*l*. more to augment their library.* After which the testator bought several books of value which were placed in the said library. It was decreed by the Master of the Rolls that the books afterwards bought and put into this library should pass to the college by the will, the court being of opinion that the word (*Now*) did not relate to the books in the library at the making the will, but on the construction of the whole sentence denoted where the said library was, and might be intended to distinguish it from any other library of the testator's. Wms's Rep. 597. 599. Hill. 1719. All-Souls-College v. Coddington.

5. By devise of *all the corn now in my barn*; if that corn be afterwards spent and new corn put in, such new corn will not pass. But by devise of *all my flock of sheep, now on such a hill*, or in such a pasture, in that case, because sheep are in their nature fluctuating and a collective body, the sheep produced afterwards shall pass. Per the Master of the Rolls in the case above.

6. And by devise of *all the horses now in my stable*, and afterwards I purchase more, the new horses will not pass because these are particular chattels, and not part of a collective body, as a flock of sheep or library of books. Indeed a flock of sheep differs somewhat from a library of books; for the former must of necessity fluctuate, but there is no necessity that books should be changed. *Ibid.* per eundem.

(C. c) Alterable or to be transferred and go over to another.

Roll. Rep. 321. S. C. and if that issue dies it shall go to his administrator, and if another be afterwards born he shall devise it from the administrator, and if more son:

1. A. Possessed of a term devised it to his wife for her life and after her decease to B. and C. his sons, and if they have no sons, equally and jointly together; but if it please God to bestow on them both men children, then my will is, it shall be reserved and put out to the use and profit of both their sons jointly together, or to one of them if they both have not men children. But if they no issue male, then my will is, after the decease of my sons it shall be to J. S. A. made his wife executrix and died. The wife assented to the legacy. The wife died. At which time B. and C. had no son but afterwards a son is born to C. Resolved that the son of C. shall take presently. Cro. J. 394. pl. 7, Hill. 13. Jac. B. R. Blandford v. Blandford.

should afterwards be born, they shall take jointly with him.

2 Sand. 198. Osborne v. Wicken-

2. Devise of 12*l*. per annum for life to A. and that if A. marry the executor shall pay her 100*l*. and the rent shall cease; the rent

rent shall not cease till payment of the 100l. By two Justices, contra Twisden, but he consented to the judgment. Mod. 272. pl. 25. Trin. 29 Car. 2. B. R. Osborne v. Walleeden.

den, S. C. adjudged accordingly.

3. A. has four sons B. C. D. and E. and being seised of land in fee devised to his wife for life, if she do not marry; but if she marry that B. presently after her death enter, &c. and enjoy to him and the heirs male of his body, remainder to C. and the heirs male of his body, &c. The wife dies unmarried, yet her not marrying did not hinder but that the lands were *entailed*; for by the whole scope of the will it appears, that devifor intended an entail with divers remainders, and rather than this intent shall be defeated, the words shall be construed thus, viz. If she marry, B. to enter presently, and if she do not marry then B. shall have and enjoy to him and the heirs male of his body with the remainder over; and judgment accordingly. 3 Lev. 125. Mich. 34 Car. 2. C. B. Luxford v. Cheeke.

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4. I give and devise my lands to my grandson R. the son of my son T. H. and to my grand-daughter E. H. equally to be divided between them, and to the heirs of their respective bodies; and in default of such issue I give the same to my grand-daughter A. H. and her heirs for ever. The jury found that R. died without issue, and that A. H. married J. J. the lessor of the plaintiff. The Ch. J. now delivered the resolution of the court upon this record; and said they were unanimously of opinion, that in this case no cross remainder ought to be allowed. He said the general rule in these cases is, that no estate shall arise, but where there is an express declaration of the party, or a strong implication to that purpose. But neither of these was in the present case; for the only words that give here any colour of doubt, are those, (and for default of such issue.) But those words may well refer to the word (respective,) as well as to the other words in the former sentence; and if so the lessor of the plaintiff is to take after either of the two other grand children dying without issue respectively; and as the plaintiff was of equal degree of kindred to the testator with their brother and sister, this much confirms this construction. The only material case that seems of any weight against this opinion, was the case of * HOMES AND MEYNEL, reported in Sir Thomas Jones 172. and in other books. But this case materially differs from that in many respects; for there the words are, if they die without issue, which something implies, that both of them are to die first; likewise there was the word all, which intimates that the lands were to go all together; so there was not the word respective, and the first devisee was the testator's daughter, the remainder-man only a nephew. He said likewise this circumstance of difference in kindred distinguished the present case from that in Dyer. 303. 326. and 4 Leo. 14. Accordingly the court gave judgment for the plaintiff. Barnard. Rep. in B. R. 367. Hill. 7 Geo. 2. and 443. Pasch. 7 Geo. 2. Cumber v. Hill.

* See tit. Remainder (X) pl. 8.

(D. c) Condition. By what Words in a Devise.

1. **D**EVISE that his lands (being fee simple) should remain in the hands of the wife his executrix for the term of thirty years *for those intents and purposes ensuing*, and first he wills, and his will and intent is, quære, if these words make a condition? the matter was compromised at the request of the parties, but the opinion of the justices was bent that the entry of the heir was not lawful. D. 163. pl. 52. Trin. 4 & 5 P. & M.

D. 163. a.
pl. 52, 53.
Trin. 4 & 5
P. & M.
Anon. S. P.
and seems
to be S. C.
says that at
the day
appointed
for the
bench the
matter was
compromised at the

2. The husband devised his lands to his wife for thirty years to the intents and purposes following (viz.) I will that she out of the *profits pay yearly to T. during the term 30l. and appointed her to pay some legacies, and that she should be bound to the said T. S. to perform the will; she paid the legacies, when she should have paid the 30l. to T. S. to pay it over to the legatees, and therefore the heir entered for a condition broken; but adjudged that this was not a condition but a declaration of the intention of the testator; for, to what purpose should the wife be bound to perform the will, if this was a condition; but judgment was not given for the parties agreed. And. 50. pl. 126. Paich. 17 Eliz. Hubbard v. Spencer.

request of the parties, but the opinion of the justices was bent against the plaintiff, viz. that the entry of the heir was not congeable. — Bendl. 287. pl. 288. S. C. accordingly.

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3 Le. 65.
pl. 97. S. C.
in totidem
verbis.

3. Devise of a rent charge to his younger son *towards the education and bringing him up in learning*, it is not conditional, and he shall have the rent though not brought up in learning, and the words (towards his education) are only to shew the intent and consideration of the payment of the sum. 2 Le. 154. pl. 186. 19 Eliz. C. B. Anon.

Bend. 271.
pl. 281.
Hill. 17
Eliz. S. C.
no judgment
was given but it

4. G. devised his lands to A. and devised also, that said A. should pay a rent to B. and that B. might distrain for it; and if A. fail of the payment of it, that the heirs of the deviser might enter; the same is a good distress and a good condition. Le. 269. in pl. 362. 20 Eliz. C. B. cites it as the case of Shaw v. Norton.

seemed to several of the justices that the plaintiff should recover, because the will was upon condition which was broke. — Dy. 348. a. b. pl. 13. Hill. 18 Eliz. S. P. and seems to be S. C. and held accordingly by Dyer and Harper, contra Manwood and Mounson and the opinion of Wray and Saunders, the Ch. J. and Ch. B. in præsentia Manwood, ad mensuram was according to that of Dyer and Harper that both penalties, viz. the condition and re-entry and the distress given to B. for non-payment are good remedies for securing the payment according to the testator's intention; but B. ought to make a demand before the distress taken.

5. M. made a lease for years. rendering rent, and for default of payment a re-entry, with covenants on the part of the lessee to repair the messuages, &c. and the term continuing, the said M. by his will in writing devised the same land to the said lessee for more years than he had to come in it, rendering yearly the like rent, and under the same covenants which he now holds it, and died, and afterwards the first term expired, the lessee does not repair the houses, and the question

question was, whether by this he has forfeited his term and adjudged that as to this it was not any condition, and a covenant it could not be, for a covenant ought always to come on the part of the lessee himself, which cannot be in this case, for he does not speak any thing in the will to bind him, but they are all the words of the deviser himself, which are comprised in a will, and it never was his intent to have it to be a condition, and therefore void as to the lessee to bind him either by way of covenant or condition. Poph. 8. cites it as adjudged in C. B. 29 Eliz. Michell's case.

6. A lessor devised to his lessee for years for the same term he had before, and paying the same rent and at the same days and upon the same covenants, which were in the first lease; adjudged, that it is not a conditional lease, so that his lease should cease, if he did not perform the covenants, for the first covenants were only by way of covenant and not conditional. Cited by Popham Cro. E. 288. in pl. 3. as entered Mich. 39 & 40 Eliz. Rot. 649. and afterwards adjudged in Machin's case.

Gouldsb. 74. pl. 1. Michell v. Duntton. S. P. and seems to be S. C. but the words there are (under the like cove-

nants) and all the court held that those words do not make a condition although they are in a will; and Periam said, that those words are void.——2 Show. 40. cites Cro. E. 288. Martin-dale v. Martin [but it should be Machin's case cited in that case] S. P. adjudged that it was not a condition but only a covenant or rather a trust.

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7. Devise to his wife, *proviso*, and my will is, that *she shall keep my house in good repair*, is a good condition. So devise of lands to B. paying 10l. to C. it is a good condition, for C. has no other remedy. Le. 174. pl. 241. Trin. 30 Eliz. B. R. in case of Creckmere v. Paterfon.

8. Devise of 100l. to his wife *pro & in exoneratione of her dower* it is a condition that she shall not have the 100l. till she make a discharge of her dower. Cro. E. 274. pl. 3. Hill. 34 Eliz. C. B. Pett v. Baseden.

9. If a man devises land to an executor *ad vendendum*, so if lands are devised to one *ad solvendum* 20l. to J. S. or paying 20l. to J. N. this amounts to a condition. Co. Litt. 236. b.

Land was devised for years to J. N. re-

mainder & solvend. annuatim at Mich. to J. S. 20s. 'Tis a condition, and for nonpayment the entry of the heir was adjudged lawful. Cro. E. 454. pl. 22. Mich. 37 & 38 Eliz. C. B. Fox v. Catline.

10. If lands are devised *in fee*, upon condition that the devisee shall not alien, the condition is void. Litt. f. 360.

11. A man seised of certain lands holden in socage had issue two daughters, A. and B. and devised all her lands to A. and his heirs, to pay B. a certain sum of money at a certain day and place. The money was not paid, and it was adjudged that these words, *To pay*, &c. did amount in a will to a condition, and the reason was, because the land was devised to A. for that purpose, otherwise B. to whom the money was appointed to be paid should be remediless, and the lessee of B. upon an actual ejectment recovered the moiety of the land against A. Co. Litt. 236. b. cites Crickmer's case.

Cro. E. 246. pl. 8. Mich. 31 & 32 Eliz. B. R. Crickmer v. Paterfon. S. P. and cites S. C. Ea intenti- one ad, &c. makes a condition

in a devise, but not in deeds. Mo. 57. pl. 162. Pasch. 6. Eliz. Anon.——2 Vern. Gundry v. Baynard. Sti. 294. Kirman v. Johnson.

12. Devise to A. in fee, on condition if he does not pay to B. a certain sum of money, that B. shall have in fee is a void condition and remainder; for it is contrary to law. Finch 46: b.

13. Devise in tail, on condition to have fee if she marry one of his true surname. The testator's surname was *Mills*, and she married one *Mill*. This was no performance though the husband was usually called as well Mills as Mill. Sti. 389. Mich. 1653. Olive v. Tong.

Nelf. Chan.
Rep. 96
S. C.

14. Mortgagee by will remits part of the mortgage money and all the interest if the rest be paid within three years. If the mortgagee does not pay within three years, he loses the benefit of the bequest. Chan. Cases 51. Pasch. 16 Car. 2. Glover v. Portington.

In which
case this
point is in-
tively passed
over, so that the words seem idle. Ibid.

15. Devise to A. he proving himself to be the son of B. and of M. his wife. See Fin. R. 278. Hill. 29 Car. 2. Pigg v. Coldwell.

Chan. Prec.
265. pl. 216.
S. C. but
S. P. does
not appear.
—Gilb.
Equ. Rep.
2. S. C. &
S. P. ac-
cordingly.

16. A. has two daughters, B. and C. A. devised to B. lands in fee simple, and devised to C. lands entailed on A. If B. will claim a share of the entailed lands under the settlement she must quit the fee simple lands; for the testator having disposed of his whole estate among his children, what he gave them was on an implied condition that each acquit and release the other; per Cowper K. 2 Vern. 581. pl. 524. Hill. 1706. Noys v. Mordant.

[333] (E. c) What a Condition, and what a Limitation.

1. **T**HE husband devised part of his lands to his wife for life, upon condition that she should educate his children in learning, remainder to his youngest son in tail, who died without issue, and the reversion in fee came to the eldest son; the condition was broken. Adjudged this was not a limitation, because there were express words of condition, but that the devise over in remainder to the youngest son had destroyed that condition, for if it had not, then the heir at law must have entered for the condition broken, and so defeat the estate of the wife, which he could not do in this case without destroying the remainder. 10 Rep. 41. b. cites Hill. 3 & 4. P. & M. in C. B. Dr. Butts's case.

2. Words in a will tending seemingly to a condition shall not be taken in law to be a condition where it appears that the intent of the testator was, that all the estate shall not be defeated. See Pl. C. 413. &c. Mich. 13 & 14 Eliz. Newys v. Larke.

3. If the intent of deviser appears that another shall take benefit of that and not the heir, then it shall be a limitation and not a condition, and he in remainder shall take benefit of it; per Doderidge Serjeant. Arg. 2 Brownl. 72. who says this was the reason of judgment in Pl. C. [Mich. 13 & 14 Eliz.] in Scholastica's case.

4. Devise that his second son *B.* shall have the land for the term of 31 years, without impeachment of waste, to the intent that he pay certain debts and legacies set down in the will; remainder after the said term expired to the heir male of the body of the said *B.* begotten, and further wills, that if *B.* die within the term aforesaid, that then *C.* his third son shall have the said term, &c. and then shall also be executor, but made *B.* his present executor. *B.* entered, *A.* the eldest son died without issue; *B.* died within the term leaving issue; yet *C.* shall have the residue of the term; and per *Martwood* it is estate by limitation in *B.* and he could not sell it, nor can it be extinct by act in law or of the law, and it was a lease determinable by the death of *B.* and so shall be the land of *C.* determinable on his own death. 3 Le. 110. pl. 159. Trin. 26 Eliz. in Scacc. Vincent Lee's case.

5. Devise to *A.* but if she died or married, then to *B.* in tail, remainder for want of issue of *B.* to *A.* to dispose at her pleasure, and if *B.* survived *A.* then to *C.* *B.* died, living *A.* By two justices this is a condition (but this devise is good as a new devise in reversion on the precedent condition, and not as a remainder) but by one justice it is a limitation. Le. 283. pl. 383. Hill. 29 Eliz. *C. B. Jennor v. Hardy.*

6. It was held that where one devises land to his wife for life, remainder to his son and heirs, and if he dies before the age of 21 years, that then it shall remain to *J. S.* in fee, and dies; the son levies a fine and dies before 21 years *J. S.* shall have the land after the death of the wife, for it is a plain limitation. Cro. E. 142. pl. 6. Trin. 31 Eliz. *B. R. Mills v. Snowball.*

7. *A.* devised to every one of his younger Sons, *B. C. D.* and *E.* to be paid when they severally come to the age of 21 years, and devised his land to *A.* his eldest son and his heirs on condition, that if he refused to pay, that then it shall remain to his younger son, &c. *A.* pays the legacies to *B.* and *C.* but refused to pay to *D.* and *E.* *D.* enters into the land in his own right and the right of *E.* upon the heir of *A.* in *descent. It was resolved, 1. That the younger sons may enter on refusal, &c. by way of limitation. 2. That though he had paid the legacies to two, yet their entry is also lawful. 3. That the descent does not take away their entry. 4. That by the entry of *D.* in his own right, and the right of *E.* the estate is vested in all four, for they take jointly, and the estate of the heir devests from him in all. Noy 51. Hill. 41 Eliz. *Ainesworth v. Batty*, alias, *Ainesworth v. Pretty.*

Mo 644.
pl. 891.
Hill. 41
Eliz. S. C.
by name of
Hainfworth
v. Pretty.—
Cro. E. 833.
pl. 2 Hainf-
worth v.
Pretty S. C.
adjudged.
—S. C.
cited per
Gregory J.
to have
been so ad-
judged. 4
Mod. 70.—
v. Sheldon.

Vaugh 271. S. C. cited in the case of *Gardiner*

[*334]

8. The testator being seised of lands held in borough-english, devised them to his second son in fee, upon condition to pay to each of his daughters 20 l. a-piece at their respective ages of 21 years; the second son was admitted, but did not pay the legacies to his sisters. Adjudged by all the justices, præter *Williams*, that this was not a limitation of his estate so as to make it go to the next who was inheritable by the custom, but it was a condition, and the elder brother shall

shall enter for the breach; It is true, if the devise had been to the elder brother upon the same condition, then it would have been a limitation and not a condition, it would have descended to the eldest son; and he would not have been obliged to perform it. Cro. J. 56. pl. 2. Hill. 2 Jac. B. R. Curtis v. Woolverston.

9. A. devised certain annuities to his younger children, so as he had expressed in several writings signed with his hand, and that his heir *shall have the disposition of his estate so long as he shall perform his will, and if he fail he devised it to others.* It was resolved that the estate shall not cease though by way of limitation without a demand of the rent, for it is payable in nature of a rent, and not as a collateral sum, and therefore demand necessary; per Jones Serjeant. Arg. 2 Jo. 34. cites Cro. J. 144. pl. 4. Hill. 4 Jac. B. R. Molineux's case.

10. A devise was, that if *J. S. shall pay 100 l. to my executors, then he shall have my land to him and his heirs.* This is good by way of devise, though not by conveyance at common law. Per Coke Ch. J. 3 Bulst. 100. Mich. 13 Jac.

11. A. seised in fee *devised* all his lands to *J. S. paying debts and legacies.* On a trial the jury found as before, but did not find that *J. S. had paid the debts and legacies*, yet this was a good verdict, because it was a condition properly, and not a limitation. See 2 Roll. Trial, (A. g) pl. 5. cites Trin. 1651. Adjudged between Johnson and Herman.

12. A devise to the eldest son, though it be by the words of condition, yet it is a limitation, and upon the limitation it ceases without entry or claim. Cart. 171. Hill. 18 & 19. Car. 2. in case of Rundal v. Ely. Bridgman Ch. J. cites 3 Rep. 21. Braf-ton's case.

13. A. devised lands to a grand-daughter, provided and upon condition that *she marry with consent of A. and B.* this makes a limitation. See 1 Mod. 86. Mich. 22 Car. 2. B. R. and Ibid. 300. Pasch. 22. Car. 2. in Canc. Fry v. Porter.

2 Brownl. 72. Arg. S. P.

14. Though the word condition is used, yet the *limiting of the remainder over* makes it a limitation. Per Hale Ch. J. Vent. 202. Pasch. 24 Car. 2. B. R. in Lady Ann Fry's case. as many resolutions as ever any point did, and cites Wiseman v. Baldwin. 18 El. 1 Roll. 412. Hainworth v. Pretty. 3 Cro. 833. and 2 Cro. Pell v. Brown, and said there were a great many more, and nothing but the opinion in Mary Portington's case 10 Rep. 41. against it. 2 Roll. R. 425. accordingly in the Serjeant's case.

[335] 15. Devise of lands to *A. his heir at law*, and other lands to B. in fee, and says *if A. molest B.* by suit or otherwise, he shall lose what is devised to him, and it shall go to B. Resolved upon the entry and claim of A. that B. is intitled to the land of A. The devise being to the heir at law. The words *if A. molest B. &c.* are words of limitation and not of condition. 2 Mod. 7. Hill. 26 & 27 Car. 2. C. B. Anon.

16. The

Sty. 281.
293. S. C.
according-
ly.

Vent. 199.
S. C. —
2 Lev. 21.
S. C. —
2 Mod. 7.
S. C. cited.

And ibid.
203. Per
Hale this
has received

16. The word *paying*, in the case of an heir, is a limitation. 2 Rep. 31. Boraston's case, cited Mod. 7. Per Cur. in S. C. cites Ow. 112. Cart. 171. by Bridgman Ch. J. that upon the limitation it ceaseth without entry or claim.

17. If he misbehave himself, or neglect to pay my debts and legacies, then he to have 5 s. and left it in direction of his executor M. He was heir at law, and waving the devise, neglected payment decreed for M. and no relief for the plaintiff. 2 Chan. Rep. 391. 2 Jac. 2. Skinner v. Kilby.

18. A. having lands in several places, devised all to his son B. in fee, and if he die without issue, then he devised part to H. his nephew and died. B. entered and made a devise of the lands, and died without issue, this is a limitation by way of remainder of the part to H. his nephew. 4 Mod. 69. Mich. 3 W. & M. in B. R. cited per Cur. to have been so adjudged. Cro. J. 290. pl. 7. Mich. 9 Jac. B. R. Brown v. Jervis. S. C.

19. A. seised in fee devised to J. S. for 11 years upon certain trust, and after he gave the said lands to the first issue male of B. and the heirs male of his body, and for default to the 2d. &c. provided they should respectively take upon themselves the surname of Edge. And if they should not take the surname, &c. or should die without issue male, as above, then to the first issue of C. (who at the time of the devise had issue a son, which B. had not) with limitation to the 2d. 3d. &c. and the same proviso as above, and if they should not assume, then to D. for life, and after to the heirs male of his body, remainder to the right heirs of A. This proviso was held to be a limitation and not a condition, and therefore the devise being void to the first issue male of B. there being no such, the devise to the issue male of C. shall take place as a remainder on the expiration of the 11 years, and it is like a devise to a monk, remainder over. 12 Mod. 278. Pasch. 11 W. 3. C. B. Scattergood v. Edge.

20. Lands are given to M. and the heirs of her body. But if she leave no sons, and only two daughters, the eldest to pay the younger 300 l. and to have the whole estate. There were only two daughters, and the money was not paid. On a bill by the younger for an account of the profits and possession of half the estate. Decreed at the Rolls to pay the 300 l. with interest from the mother's death in 6 months, or account for the profits of a moiety, and the moiety to be set out by commissioners. Upon appeal Wright K. ordered the decree to stand as the account of the profits and partition, but where the other decree was, that plaintiff should hold and enjoy, those words were ordered to be struck out, the same amounting to a foreclosure, but defendant being an infant must have a day after she comes of age to shew cause. 2 Vern. 479. Hill. 1704. Gundry v. Baynard.

21. A. by will devised to M. his niece, and the heirs male of her body upon condition, and provided that she intermarry with, and have issue male by one surnamed Searle; and in default of both conditions, he devised to N. (in the same manner) and in default thereof he devised to B. for 60 years if he so long live, remainder to the heirs of the body of the said B. and their issue male for ever. Adjudged

And says it is held in 1 Vent 199. 202. Fry v. Porter. — Words of an express condi-

tion shall not ordinarily be construed as a limitation. But where an estate is to remain over for breach of a condition which is by express word of a condition, yet it ought to be intended as a limitation. Per Holt Ch. J. 11 Mod. 61 S. C. — 2 Roll R. 425. *the Serjeant's case*, S. P. — They shall be according to the common law as conditional, where it is not necessary to expound them contrary, as in case of a devise to an eldest son on condition, it is necessary to take it as a limitation, but otherwise in case of such devise to a younger child. Cro. J. 57. pl. 2. Hill. 2 Jac. B. R. *Curtis v. Wolverston*.

(F. c) What a Condition ; And what a Trust.

Cro. E. 288. pl. 3. *Martidale v. Martin*. S. C. adjudged. — Poph. 6. S. C. adjudged. — S. C. cited Arg. 2 Show. 40. — S. C. cited Arg. Goldsb. 134.

1. A. devised certain land to B. and C. his wife, who was the daughter of A. upon condition that they within 10 years should give so much of the land as was of the value of 100 l. per ann. to F. F. and that he should find a preacher in such a place, and if they failed, their estate to cease, and that then his executors should have the land to them and their heirs, upon trust and confidence that they should stand seised to the same uses. B. within the 10 years made a writing of gift, grant, and confirmation, but no livery nor enrolment of it till after the 10 years. The executors refused to take upon them the execution of the will; yet it was adjudged, they should take the land by the devise, and that the words upon trust or confidence, made not a condition to their estates. Mo. 594. pl. 806. Mich. 34 & 35 Eliz. *Gibbons v. Marlward*.

2 Lev. 249. S. C. adjudged accordingly by three justices, contra Jones J. that it is not conditional but a trust to pay. — 2 Jo. 113. S. C. and per Cur. a fee passed, and judgment for the defendant; and afterwards affirmed in the exchequer-chamber. — 2 Show. 42. at the end of the case observes, that Pollexfen 599. mentions that judgment was for the plaintiff [the heir at law] which he says seems a mistake.

2. A. seised of lands in fee makes his will and give 20 l. to A. to be paid out of his lands in one year, and 20 l. to B. in two years, &c. and 50 l. to C. &c. and then gives all his lands to J. S. generally. Per 3 J. contra Jones J. This is a trust and not a condition. 2 Show. 36. pl. 28. Pasch. 31 Car. 2. B. R. *Freak v. Lee*.

3. A. makes J. S. and J. N. his executors, and gives them 20 l. legacy a-piece. He devises likewise to his executors 800 l. in trust, for payment of several annuities to D. E. and A. for life, far exceeding the interest of the 800 l. and makes B. residuary legatee. The annuitants die, and a surplus remained of the 800 l. which was decreed to B. the devise to the executors not being conditional, but the 800 l. was only deposited in their hands in trust for payment thereof. Vern. 425. pl. 400. Hill. 1686. *Cock v. Berish*.

4. Land was devised to the heir at law, paying a sum of money to B. It was held in this case, that paying did not make a condition, because no one could enter for the condition broken but the devisee himself; but this would be a trust upon the land for raising the money, and if a purchaser had notice of the will, he should be affected

lected with it; and in this case it was said, that in case the devise were to a stranger paying 100 l. to A. that this makes a condition, and that the heir may enter for the breach of it; but when he has entered he shall be a trustee, so far as to secure the 100 l. 2 Freem. Rep. 298. ph 348. Hill. 1704. Anon.

(G. c.) Conditions. Whether broken or not, or [337]
how to be performed.

1. **I**F a man devises his land to J. S. paying 100 l. to W. N. this shall be intended fee-simple; and if he does not pay it in his life, yet if his heir or executor pays it, this suffices; quære of his assignee. Br. Testament, pl. 18. cites 29 H. 8.

2. Devise of land to B. upon condition to pay 5 l. out of the land quarterly to J. S. and if not paid that J. S. might distrain, and adds further, that his will is, that the rent be paid accordingly; the rent need not to be demanded, and if not paid the condition is broke and the heir may enter. D. 348. a. pl. 13. Hill. 18 Eliz. Anon.

3. A. bequeathed a term to his wife, provided that if she marry from the house, then, &c. Popham Ch. J. held, that her marrying at all is a marrying from the house; for she was no longer widow of that house, though she married with one of that kindred and who had no other house, but would dwell in the house bequeathed. Went. Off. Executors 254, 255. cites 37 El. B. R. Low v. Carter.

4. Condition of a devise of lands was to permit the executor to take the goods then in the house or else the estate to be void. A verbal denial is no breach, but shutting the door against them, or laying hands upon them to keep them out, or any such like act done, is a breach. 8 Rep. 91. Mich. 7 Jac. Frances's case.

5. A clause in a will was, that if any legatee should refuse to pay to his executor what was justly due from them at his death, either by specialty; or otherwise, then such person was to have no benefit by the said will. A legatee had been a debtor for 1500 l. but effects of his having afterwards come to testator's hands the court referred it to a master to examine how much and to report the same specially. Fin. R. 25. Mich. 25 Car. 2. Blew v. Baker.

creed against the legatee, and dismissed his bill. Fin. R. 367. Trin. 30 Car. 2. S. C. revivor.

It appearing that more was due from the legatee to the testator, than the legacy amounted to; the court do on a bill of

6. A legacy is given on condition not to interrupt the will; per Master of Rolls, where there is *probabilis causa litigandi*, the legacy is not forfeited by contesting. 2 Vern. 91. pl. 86. Mich. 1688. Powell v. Morgan.

Condition was not to give his executor any trouble in relation to

his estate; legatee brought a bill against the executor, for which there was very little colour, among other particular demands the legacy. Lord Chancellor thought the suit very frivolous,

and though he should not make the legacy forfeited, yet declared if the plaintiff did not pay the costs the executor was out of purse, he would dismiss the bill. Select cases in Canc. Lord King's time. 1. Pasch. 1724. Nutt v. Burrell.

After the death of J. S. the daughter having never refused to marry J. S.

7. If a man devises his land to his daughter upon condition, that she marry J. S. at or before her age of twenty-one years, and if she refuse, that then the land shall be to another, and J. S. dies before her age of twenty-one. Yet the other may not enter till the daughter has accomplished her age of twenty-one. Skin. 320. Trin. 4 W. & M. in B. R. Thomas and Howell.

married W. R. at her age of seventeen; adjudged that the condition was not broken, it being become impossible by the act of God. Adjudged in C. B. and judgment affirmed in error in B. R. 1 Salk. 170. Trin. 4 W. & M. Thomas v. Howell. — 4 Mod. 66. S. C. 3 judges were for affirming the judgment but Gregory J. contra.

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8. A devise was of lands on condition to pay 20 l. at a day certain. The money was not paid at the day. It was adjudged to be no breach without a demand and refusal; cited per Ld. Wright. Ch. Prec. 161. Pasch. 1701. as the case of Robinson v. Holmes in C. B.

3 Chan. Rep. 206. S. C. decreed that they must severally release, but does

9. Legacies are given to A. B. and C. upon condition, that as they came of age they should release all claims to the testator's estate. Per Ld. Keeper Wright, this condition is to be construed distributively, that such only should forfeit their respective legacies who should not release, and the others not be prejudiced. 2 Vern. 478. pl. 432. Hill. 1704. Hawes v. Warner.

mention the distinction taken in 2 Vern. — 2 Freem. Rep. 277. pl. 347. S. C. but S. P. does not appear.

2 Vern. 668. pl. 596. S. C. but S. P. does not appear.

10. The father gave a legacy of 40 l. to his son upon condition that he should not disturb the trustees. They applied to the court for an execution of the trust, and that he might either join with them in a sale or lose the legacy; and decreed accordingly, per Ld. Harcourt. Wms's Rep. 136. Hill. 1710. Webb v. Webb.

(H. c) On Condition.

Notice in what Cases necessary, and what shall be said Notice.

1. THE testator had a wife and three sons, G. W. and T. and he devised his lands to his wife for life, and after her decease to G. his eldest son and his heirs for ever, and if he die without issue of his body, then to W. the second son and his heirs for ever; and if both of them die before they have issue of their bodies, then to T. the youngest son and his heirs for ever; and if G. shall enjoy the lands, then he shall pay to each of the younger sons 20 l. and if he refused, then the lands shall remain to W. for ever, paying to the eldest and youngest son such a sum; and if W. enjoy the lands then he likewise to pay to T. 20 l. the testator died, and then G. died without issue, and afterwards

afterwards the wife died, then T. made his will, and his wife executrix, and died and W. the second son entered and was seised in tail, but did not pay the money to the executrix of T. now if this was a conditional estate to the second son as it certainly was to the eldest, then he ought to have given notice to the executrix, when he intended to make his entry, that she might be there ready to demand the money; because there can be no refusal to pay, without a demand, and the executrix could not tell when to demand it, till she had notice of the entry. Poph. 10. Hill. 35 Eliz. Ward v. Downing.

2. A. devised annuities to his younger children out of lands in N. and adds, *if my heir do not perform my will herein*, then I will, that my executors and the survivors of them shall have the order and disposition of my said lands to perform my will, and my heir to have no meddling therewith, but so long as he shall perform my will he shall have the order and disposition of them, and *if by default in my said heir, and also in my said executors my will is not performed*, then I will, that all my said lands shall be to my younger children during their lives, and made B. his eldest son and C. and D. two of his younger children, and J. N. and J. S. executors. The heir does not pay, nor the executors; resolved the younger children cannot enter, because there must be default in the heir and also in the executors before such entry, and default cannot be in the executors, till notice to them of the non-payment by the heir which they cannot be intended to know without express notice, and without such notice no condition is broken to give the younger children or any of them title to enter. Cro. J. 145. pl. 4. Hill. 4 Jac. B. R. Molineux v. Molineux.

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3. A. makes his will in the presence of B. some years before his death, and devised land to C. the wife of B. on condition to pay a great sum of money. A. dies, the will was suppressed several years by the wife of devisor. B. sues in chancery by which the will is produced, the condition is not performed. Neither B's being present at the making the will, nor its being in chancery, though at his own suit, or being produced in any other court in which himself is party is any notice to avoid the estate for non-payment while the will is in question. See Palm. 164. Pasch. 19 Jac. B. R. Saunders v. Carwell.

4. A devise was to fix persons to pay certain sums for maintenance of an alms-house, &c. and if through obliviousness or other cause the trusts were not performed, then to J. S. upon the same condition; and if J. S. failed, then to the mayor and commonalty of London upon the same trusts. The six did not perform the trusts. Whereupon J. S. entered and the heir at law of the devisor entered upon him, and a fine with proclamations was levied and five years passed. And the better opinion was, that the mayor and commonalty of London were bound to pay the money appointed by the will, though they had no notice that the six persons or J. S. had failed, though indeed the case is adjudged against them as being barred by the fine and non-claim; per Rainsford J. Vent 201. cites Cro. C. 505.

They conceived that the limitation to the Mayor and Commonalty was void being a possibility upon a possibility, but otherwise that notice was not material. But

for these
two last
points the

[pl. 20. Hill. 15 Car. B. R.] The mayor and commonalty of London v. Alford.

court was not so unanimously resolved. Cro. C. 577. S. C.

In Alford's case the debate was occasioned by the special penning; for it was thus, that if *through obliviousness* the trusts should happen not to be performed; now there could be no oblivion of that which they never knew, and therefore there is some opinion there, that the mayor and citizens of London ought to have had precedent notice; yet the judgment is contrary for they could not have been barred by the fine and non-claim if notice had been necessary to the commencement of their title, and it is not found whether those to whom the estate was devised before had notice; per Hale Ch. J. Vent. 205. Pasch. 24 Car. 2. B. R. in case of Fry v. Porter.

5. A devise of lands *paying several sums of money to several persons strangers*; the question was, whether in this case there being notice whether he was not bound at his peril to pay it, although the land did depend upon it, yet it was held he *ought to take notice* of it at his peril where-ever they were. Cart. 94. Arg. cites Pasch. 14 Car. 2. Newel v. Brown.

6. Where the devisee, who is to perform the condition, is *heir at law*, notice of a condition must be given to him; because he having a title by descent, need not take notice of any will, unless it be signified to him, and so is Fraunces's case 8 Rep. But where the devisee is a *stranger*, and not heir (as in the principal case) he must inform himself of the estate devised to him, and upon what terms; per Rainsford J. Vent. 200, 201. Pasch. 24 Car. 2. B. R. in case of Fry v. Porter.

8 Rep. 92. a.
Mich. 7
Jac. the
third reso-
lution.

7. Lands were devised *to the heir for 60 years, on condition not to disturb the executor on removing the goods*. Resolved that he should not lose his estate upon a disturbance before he had notice of the will. Per Rainsford J. Vent. 200, 201. Pasch. 24 Car. 2. B. R. cites 8 Rep. Fraunces's case.

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8. The husband devised his lands *to his wife for life, then to his eldest son and his heirs, paying to his youngest son 40 l. and failing his said eldest son, then to come to the youngest son and his heirs*; the money was not paid by the eldest son as directed by the will, and the question was, whether his estate was forfeited by non-payment of the money, without notice of his father's will? it was insisted for him that it was not forfeited, because it shall be presumed, that being the eldest son he entered as heir, which is a better title than he had by the will; it is true, if the devise had been to a stranger; in such case, as he takes notice what estate he hath by the will, so he is bound to take notice upon what condition it is given; but the heir at law is not bound so to do; for which reason it was adjudged, that *notice must be given to him of a condition annexed to his estate*. Lutw. 804. 809. Trin. 8 W. 3. Whaley v. Read.

(I. c) Condition Broken.

Relieved, or not. In what Cases.

1. **A** condition not performed within the time by reason of the will being contested, the court gave farther time for performance. Fin. R. 53. Hill 25 Car. 2. Moseley v. Moseley.

2. There was a clause in a will that if any legatee should hinder or oppose the execution of his will, such person should lose the legacy bequeathed; yet the court held that a suit in equity in opposition was no forfeiture. 2 Ch. R. 105. 27 Car. 2. Moseley v. Moseley.

A freeman of London gave a legacy to his daughter, provided that if she

or her husband refuse to give a release to his executor after his death, or should any ways disturb them by virtue of the custom of London, that then the legacy should go over to J. S. It was held by the Master of the Rolls that by the husband and wife's claiming the orphanage part the legacy was forfeited, by reason of the devise over. 2 Wms's Rep. 328. Trin 1729. Cleaver v. Spurling.

3. J. W. having five daughters, devises his lands to W. W. his son and the heirs male of his body, remainder to W. W. and his heirs upon condition that he should pay 500 l. to such of his daughters as should be then living. And if Sir W. W. should refuse to pay the 500 l. then he devised to his daughters and their heirs. Sir W. W. dies living W. W. the son who was tenant in tail, and devised this reversion to W. the eldest son of his cousin J. W. of B. whereas his eldest son was named A. W. W. the son dies without issue; A. the last devisee refused to pay the 500 l. to the daughters for three years, but now proffered to pay it, provided he might have the land. The Ld. Chancellor held, that this condition being for payment of money, although in strictness of law the estate was forfeited by the non-payment of the money and although there were an express limitation to the daughters, yet this was but as it were a mortgage or security of money, and the daughters being paid the said money and damages, they were at no damage; and so decreed that A. paying the same should have the land. 2 Freem. Rep. 9, 10, 11. pl. 9. Mich. 1676. Wheeler v. Whitehall, & al'.

4. Where a legacy was given on a condition to be performed by a third person, who refused, but afterwards complied, though the money on refusal was bequeathed over to the executors of testatrix, yet the forfeiture was relieved, because the devising it over to the executors was no more than what the law implied, and in the principal case the condition might be performed afterwards, and so where any compensation might be made for it. The case was this, a feme covert having power to devise lands, devised them to her executors to pay 500l. out of them to her son at 21, provided if the father of the son did not give a sufficient release to the executors of the goods and chattles in such a house, then the devise to be void and go to the executors. 2 Vent. 352. Pasch. 33 Car. 2. in Canc. Cage v. Russel.

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5. A devise of lands was made to the eldest daughter paying 100 l. to the second daughter, and 100 l. to the third daughter, &c. and if the eldest daughter did not pay the 100 l. to the second daughter by such a day, then he devised the land to the second daughter, she paying her sisters portions by a certain day; and if she did not pay, then he devised the land to the third daughters, &c. It was resolved this was not in the nature of a mortgage to be redeemable after the time of payment was over; but that, the eldest daughter not paying at the time appointed, the second daughter should have the land, and the eldest had no relief. 2 Freem. Rep. 206. pl. (280. b.) Mich. 1695. cited by the Master of the Rolls as Man's case.

(K. c) Condition broken.

Made good in Equity, though the Devise is void in Law.

1. A Devise made to a daughter to pay her a sum of money if she will be divorced from her husband; the gift was made good, though the condition was void. Toth. 141. cites 6 Jac. Tenant v. Bray.

2. A. devised to his wife for life, and after to his eldest son, on condition that if his wife should be with child, 80 l. should be paid by the heir at law to the child after the mother's death; she had a child, and after the mother and eldest son convey away the lands to a purchaser; upon notice proved of the will, the money was decreed to the daughter, and declared it was a trust devised to go with the land, and yet this will was void in law as to the legacy, seeing he who was to have the benefit of the breach of the condition was heir, and so the party that should pay the legacy. 3 Ch. R. 93. 24 Car. 1. Smith v. Atterby.

(L. c) • On Condition.

Extent thereof.

1. A seised in tail of lands in D., makes an exchange with B. for Black-Acre; B. being also seised of Green-Acre and White Acre, devises Green-Acre to his heir at law, and White-Acre to a stranger, proviso that he does not re-enter or claim any other of his lands, and if he do, then the estate devised to cease. A. dies; the heir enters into the entailed lands, and waves Black-Acre taken in exchange, and before any other entry, the heir of B. enters upon Black-Acre, which was given in exchange by B. This was held no breach of the condition, because Black-Acre was not B's estate

estate at the time of the devise, and therefore out of the condition. Godb. 99. pl. 115. Mich. 28 and 29 Eliz. C. B. Barper: v. Topfield.

2. A. charged lands with payment of annuities to younger children, and if my heir does not pay them, then I will that my executor shall have the order, &c. of my lands to perform my will, and my son and heir to have no meddling therewith. It was held by all the justices against Popham, that *heir* here is *nomen collectivum*, and extends to the heir of the heir of the devisor, and so to every heir; though Popham thought that the intent should not be stretched in a condition. Cro. J. 145. pl. 4. Hill. 4 Jac. B. R. Molineux v. Molineux.

3. A. devised to B. all his lands in H. for his life, remainder to his first and other sons in tail, &c. and all the rest and residue of his estate real and personal to B. and the heirs of his body, upon condition in both bequests that he pays his debts and legacies. Ld. Cowper, held that the condition extended to both devises, as well to the estate in H. as to what passed by the general devise of the rest and residue of real and personal. 2 Vern. 594. pl. 533. Mich. 1707. Grimston v. Ld. Bruce.

4. A. devises 1500 l. to B. C. and D. to be paid at their respective marriages, as well principal as interest, and if any of them die unmarried, her legacy to go to the survivor or survivors. C. married and received her share; D. died unmarried; per Cowper C. the condition, though, not again repeated, shall go to the whole, as well as to what accrued by survivorship as to the original devise. 2 Vern. 620. pl. 556. Mich. 1708. Moore v. Godfrey.

(M. c) Condition Precedent.

What is.

1. **T**HE word *paying* makes a condition subsequent Arg. Mo. 363. 38 E. 3. Fol. 11 & 12. Devise of land to A. so that he pay my debts, viz. 10 l. to J. S. and 12 l. to W. R. The payment ought to be upon request and subsequent, and cites 4 E. 6. Br. estates 78.

Though in grants estates shall not be till the condition precedent be performed.

formed, yet it is otherwise in wills, for wills shall be guided by the intent of the party. Cro. E 219. Jennings v Gower.—Le. 229. S. C.

2. A. by will in writing devised his leasehold estate to J. D. and (being seised of other land in fee) after devised to his executors all the residue of his estate, mortgages, goods, &c. his debts paid and funeral expences discharged. In this case the payment of the debts, &c. is a condition precedent, so that the executor cannot have it before the debts paid and funerals discharged. See trial (A. g) pl. 15. cites Hill. 10 Car. B. R. Wilkinfon v. Meream.

Glb. Eq.
R. 74.
S. C. & P.
held by L.
Keeper ac-
cordingly.
— Abr
Equ. cases
244. pl. 10.
S. C. held
accordingly.

3. A devised a term for years to his wife for life, and after her death to the child she was then ensient with, and if such child die before 22, then he devised it as to one third part to the wife, her executors, and the other two thirds to J. S. The wife was not ensient at the time of the will, yet the lord Harcourt held the devise good to her of such third part of the term. Ch. Prec. 316. pl. 241. Mich. 1711. Jones v. Westcombe,

[343] (N. c) What shall be a Determination of the Condition, Limitation, or Contingency;

1. **D**EVISE to A. and his heirs, and if he die before 24 and without heir of his body, then to B. If A. attain 24 he has a fee. D. 124. a. pl. 38. Mich. 3 & 3 P. & M. Anon.

2. A man deviseth his lands to his wife *de anno in annum* till his son shall come to the age of 20, and dies; the wife enters, the son dies before he attains 20 years. Resolved, the interest of the wife was determined; but by Dyer, if the devise had been until the son should or might come to the age of 20 years, there, notwithstanding his death, the estate of the wife had continued. Mo. 48. pl. 143. Pasch. 5 Eliz. Anon.

3. If any of his sons shall alien or demise any of the lands devised before 30 years of age, that then the other shall have the estate; the eldest, before his age of 30 aliened the land; the youngest son before his age of 30 years enters for the alienation, and after, before his age of 30 years aliens the same. Adjudged, that after the entry for the alienation, the land is discharged of all limitations. Owen 8. Hill. 30 Eliz. C. B. Spittle v. Davis.

4. Termor for years of a close devised his close to A. after he shall attain 22 years of age, and if he dies within the term, the remainder of the term to B. after he shall attain the age of 22. A. attained 22. and entered and died within the term, and after B. died within the term under 22. The executors of A. shall have the term and not the executors of B. nor of the testator himself. The devise to B. is expressly limited upon a contingency, and his dying before the contingency happened, destroyed the contingency and makes the devise by matter *ex post facto* void. 2 Sid. 130. 151. Hill. 1658. & Pasch. 1659. Fynimore v. Crockford.

5. A. devised land to B. for 30 years after the death of C. if C. die within ten years next. 2 Sid. 151. cites it as held per Popham, 1 Rep. 155. b. that if C. survives the 10 years the devise was utterly void, and that the entire term passed to B. the first devisee, and says that now the court held this for good law, in the case of Fynimore v. Crockford.

6. A. possessed of a term, devised it to his wife and after her death to B. his son (being beyond sea) when he comes back, otherwise C. another son to have the term. The wife died, C. in the absence of B. entered, and adjudged that the intire term was in C. cited per Glyn Ch. J. 2 Sid. 152. as Rotham's case.

7. Devise of 600 l. to B. to be paid within six months after my decease. After, in another part of the will, my will is, that if B. die before 21, I give the 600 l. to C. Testator died and after six months, but before B. was 21, viz. at 19, the executor gave B. bond for the 600 l. B. by will bequeathed it to J. S. Ld. Shaftsbury decreed the 600 l. to C. but upon rehearing by Ld. Nottingham, assisted by two judges, it was decreed that the security was a good payment, and that the will having taken effect by payment at the end of six months, the property was absolutely vested in B. and the contingency at an end; for where a certain determinate time is appointed for payment of a legacy, and afterwards a contingent clause is added touching the same legacy, it will be inconsistent unless the contingency happen within the time appointed for payment. Fin. R. 26. Mich. 25 Car. 2. Clent and Sutton v. Bridges

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8. Testator devised his estate to his executors for 15 years after his death, with a power for them to nominate which of the sons of N. M. should pass the said lands. The court directed the executors to nominate one within a fortnight, otherwise the court would nominate one of them. Fin. Rep. 53. Hill. 25. Car. 2. Moseley v. Moseley.

9. A. devised 600 l. a-piece to B. and C. to be paid at 21, and gave the residue of his personal estate to G. and also his lands; but if either die in their minority, the survivors should be heirs in equal proportions. G. died under age, B. being of age but not C. and decreed that a moiety of the residue upon the death of G. immediately vested in B. and C. and was no longer subject to any contingency on the death of C. should she die under age. Fin. 436. Mich. 31 Car. 2. Bargrave v. Whitwich.

2 Chan. Rep. 131. Burgrave v. Whitwich. S. C. decreed accordingly.

10. Sir H. M. being seized in fee of thirty-five shares in the New-River, and having a son by the first venter and five children by the second venter, devised to his five children by the second venter five shares, scil. to H. and his heirs one share, to A. and her heirs another share, provided that if any of his said younger children die before they shall have attained his or her age of twenty-one, or be married, that then the share of such child so dying shall go to the rest of the said younger children share and share alike. H. dies unmarried before twenty-one; and after A. dies being married, and adjudged upon a special verdict, that the part of H's share which was in A. shall go to the heir, scil. her brother of the same venter and whole blood, and not to the son and heirs of Sir H. M. by the first venter. Skin. 339. pl. 5. Pasch. 5 W. & M. in B. R. Middleton v. Swain,

Comb. 201. Middleton v. Swain. S. C. adjudged that they were tenants in common of that part for life only; for the word (share) does not denote the interest but the quantity. — Show. Parl. Cases 211.

Swain v. Lane and Pawlknor S. C. affirmed in the House of Lords.

11. A man possessed of a term, devised it to infant in ventre sa mere if it should be a son; and if it should be a son and die during his

his minority, then he devised it to his grand-son, after which he died, leaving his wife executrix, and the child was after born, and proved a daughter, and it was adjudged without argument that the executrix, and not the grand-son, should have the term, because the grand-son was not to have it but upon a precedent contingency, viz. the birth of a son and his death in his infancy, which condition must be first performed, and it appears plainly that the intent of the testator was, that he should not have it otherwise. 12 Mod. 128. Trin. 9 W. 3. *Grascott v. Warren.*

12. A. has four children B. C. D. and E. and devises *a house to each of them, and the heirs of their several bodies*; and then adds, but my will is, that if any of my said children die before 21 or unmarried the part or share of him so dying shall go over to the survivors. B. died after his age of 21, but unmarried. Per Holt Ch. J. B's house shall go over to the survivors; and if C. dies of age and unmarried, his shall go so too; but what goes over on either of their deaths shall not go over a second time; and that by the devise over only an estate passed to the survivors for their lives in such shares; and decreed accordingly. 2 Vern. 388. pl. 356. Mich. 1700. *Woodward v. Glasbrook.*

13. A. devised portions to B. C. D. and E. to be paid at their respective ages of twenty-one or marriage, and if any of them die before the time of payment, or without issue, then his or their share to go to the survivors or survivor of them and his heirs. D. died without issue under age and unmarried. The Master of the Rolls held that D's share was liable to the contingency of surviving till it came to the last, and that therefore B. the plaintiff is not yet intitled to have his share of D's principal. But no direction being given as to the interest in the will, it was decreed that B. have a proportionable part of the interest during his life, else the interest must lie dead till it come to the last, which would be inconvenient, though in cases not so circumstanced the legatee has not been allowed the arrears or growing interest, but it has fallen into the residuum of the personal estate. Ch. Prec. 528. pl. 325. Pasch. 1719. *Nicholls v. Skinner.*

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14. A. being seised in fee, and having three sons, devised Black-Acre to Giles his eldest son and to his heirs, and White-Acre to Edward his second son and his heirs, and a rent charge of 50 l. per ann. issuing out of *White-Acre* to Roger his youngest son and his heirs; proviso, that if either of his sons should die without issue, living the other two, so as his estate in lands should come to the other two sons, then the rents should cease. Giles died leaving issue John Peacock the defendant; and Roger died without issue; so that this contingency could never happen, because Giles had issue, and he being dead, and Roger likewise without issue, their estate in lands could never come to two, where Edward alone was surviving, therefore the rent-charge must descend to the defendant as heir at law, being the son of Giles, the eldest son of the testator; for this is an executory devise to two on the contingent of one dying in the lifetime of the other two, which contingent must arise within the compass of one life, otherwise it is void; for it is plain that the testator intended

intended this benefit of survivorship during his sons lives only; and the court being of that opinion, judgment was given for the defendant. 8 Mod. 347. Hill. 11 Geo. Parsons v. Peacock.

15. A. seised in fee devised his lands to B. his son and only child in tail general; and if B. should die without issue and M. his wife survive him, then the wife to have the premises for life; remainder to C. his sister for life; and after her decease (B. being dead without issue as aforesaid) then the remainder to R. and his assigns for ever. A. died; M. died living B. afterwards B. died without issue, and C. entered and enjoyed for her life, and being heir at law on the death of B. without issue, the question was between the heir of C. and R. the devisee of the fee, whether this contingency of B's dying without issue in the life-time of B. was annexed as well to the devise to R. as to the devise to C. so as to prevent its taking effect; and this matter coming on at Chelmsford assises, and being by consent made a case to be determined by Mr. Justice Reynolds who tried the cause, he took time to consider of it, and then delivered his opinion, that the contingency extended to all the devises. 2 Wms's Rep. 390. Mich. 1726. Davis v. Norton.

16. A. bequeathed some South-Sea-stock and annuities to trustees to apply the dividend, for the maintenance of E. his grand-daughter till 21 or marriage, and at that age or marriage, with consent of J. N. and J. S. they shall transfer the stock, &c. to her; but if she marry without their consent, then the executors trustees to pay her the dividends during her life, and after transfer the stock and annuities to her children, and if she die without issue, then to go over. E. lived to 21 and never married. Ld. C. King held that E. being 21, she had an absolute interest vested in her, and that the forfeiture must be intended only of marriage without such consent before 21, and decreed the stock and annuities to be transferred to her. 2 Wms's Rep. 547. Trin. 1729. Delbody v. Boyville.

(O. c) Entry by the Heir for the Condition [346]
broken.

In what Cases.

1. A Man devised his land to sell by his executors, and to make distribution for his soul and dies, and A. and B. tendered money immediately for the tenements, but not to the value, and the executors refused, and held the lands in their hands by two years, and sold more dear, and took the profits to their own use, without distributing any thing for the soul, &c. And because they refused to sell upon the tender, and converted the money to their own use, the heir recovered against them in assise; Quod nota; Br. Devise, pl. 19. cites 38 Aff. 3.

Br. Condi-
tions, pl.
139. cites
S. C.

2. If executors or other who are put in trust by devise to sell, &c.
will

will not perform the trust, the heir may enter; per Thorpe; quod non negatur. Br. Devise, pl. 46. cites 39 Aff. 17.

But if there be issue for life, the remainder unto a stranger in fee by deed indentured upon condition that the lessee shall pay yearly 10 l. at the feast of Easter unto the lessor and his heirs,

and after the condition is broken for which the lessor does enter, now by his entry the remainder is defeated, because it was all by one deed, and the condition did depend upon the whole estate, &c. And the lessor cannot have a less estate when he enters for the condition broken than he had at the time when he left the possession, &c. no more than a man seised of land in fee by matter in deed or in writing can lease the same land for life, reserving unto himself a lesser estate in reversion than a fee, &c. And yet in the case of a devise, the remainder shall not be avoided by the entry of the heir for the condition broken, because the will of the devisor should be observed inasmuch as it may be, &c. Perk. l. 564.

If a man seised of land in fee leases the same land for life, the remainder unto a stranger in fee, reserving unto the lessor and his heirs 10 s. rent, and if the rent be behind, &c. that the lessor and his heirs shall enter for the condition broken, and shall retain the land during the life of the lessee and no longer, if the lessor enter for the condition broken in the life of the lessee, and afterwards the lessee dies, he in the remainder may enter upon the lessor, and have his remainder, &c. And know that in the principal case, the remainder cannot take effect presently after the condition broke, because the devise was once effectual in the devisee for life. Perk. l. 565.

(P. c) To the Heir.

How he shall take. What Estate; And where by Devise or Descent.

Goldb. 88.
pl. 14. S. P.
But

1. **T**HE heir shall not take by descent where there is a remainder over. Arg. Mo. 363. cites 2 Ma. Br. Devise 41.

where a younger son is made tenant in tail, remainder to the right heirs of the testator, and testator dies, and then the youngest son dies without issue living his elder brother, the elder brother shall take by descent, and not by the will. 1 Salk. 233. Nottingham v. Jennor. — Wms's Rep. 23. S. C. and S. P. admitted by Holt. Ch. J. — Ld. Raym. Rep. 570. S. C. and S. P. by Holt. Ch. J.

2 Sid. 53.
cites S. C.

2. Devise to the heir and his heirs for ever at his age of 24. and if he die without issue, remainder in tail; the heir attains 24. He is in by descent, because the fee simple is given to him, and there is no intail now by the will. D. 124. pl. 38. Mich. 2 and 3 P. & M. Anon

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Where a devise was to the wife, then to A. (who was heir at law)

3. Where the devise is for the benefit of a stranger, there the heir shall take by the devise, and not by descent. Per Widdon J. 3 Le. 26. pl. 53. Mich. 15 Eliz. B. R. in case of Cowper v. Burrough, alias Tower v. Burrow.

and his heirs, paying 100 l. when he shall come into possession; A. died in the life of the wife. Decreed that the heir at law of A. is chargeable with the 100 l. he taking only by purchase, and not by descent. 4 Nov. 1738. Decreed at the Rolls. Miles v. Leigh.

Where

Where a devise is to the heir at law in tail, remainder in fee to a stranger, the heir cannot refuse the devise for the prejudice of the stranger. Br. Age, pl. 2. cites 3 H. 6. 46.

4. Devisor has issue two daughters by several venters, A. the eldest, B. the youngest, and devised *one moiety of his land to his wife for seven years, and that A. enter into the other moiety the day of the marriage*; and further he wills, that *if his said wife be enstent of a son, that then the son shall have the land, and if with a daughter, that then his daughter shall have her part and portion of his said lands with his other two daughters*. The wife was not enstent; she enters into the moiety within seven years; A. marries and enters into the other moiety; B. dies without issue; the seven years ended; A. had but a moiety of this land devised to her and not three parts of it; for the heir of the whole blood shall have the other moiety by descent alone, and so was it adjudged which is partly contrary to the words of the will. And. 47. Trin. 17 Eliz. Cooper v. Burrold.

This liberty given to A. to enter into the moiety is not to be understood as a devise or gift of any estate to her, but only the use and occupation, which B. for the term of her age cannot do. D.

342. a. b. pl. 54. Tower v. Burrow. S. C. adjudged. — 3 Le. 25, 26. pl. 53. Anon. but S. C. — Jenk. 242. pl. 25. S. C.

If A. has issue four daughters, and he devised to one of them, it is good for the whole land so devised to her, and no part of the land so devised shall descend to the other. Per. Doderidge J. Godb. 412. pl. 449. Trin. 21 Jac. B. R. in Summers's case. — S. P. by Doderidge J. a. Roll. Rep. in S. C.

A. has two daughters B. and C. — B. has a son and dies. — A. devised the land to the son and his heirs. — He takes the whole by devise, and not a moiety by the descent as heir and a moiety by the devise; for there can be no such descent as the descent of a moiety to one coparcener as heir, but the descent is to all. 1 Salk. 242. pl. 3. Hill. 1. Ann. B. R. Reading v. Royston. — Chan. Proc. 222. Rawlston v. Reading. S. C. adjudged on a case stated, that the son took the whole by purchase.

5. Devise to his wife till his eldest son should be 24, and then the wife should have the third part for her life, and the son the residue, and that if the son die before 24 without heir of his body remainder over; The devisor died, and the son came to 24; per Dyer and Manwood J. here is not any estate tail; for no estate tail was to arise before his age of 24, and therefore the tail shall never take effect, and the fee simple descends and remains in the son, unless he die before 24, and then the entail vests with the remainder over, but now having attained his full age, he hath a fee simple, and that by descent. 2 Le. 11. pl. 16. Hill. 20 Eliz. C. B. Hind v. Lyon.

3 Le. 64. pl. 96. S. C. in totidem verbis. — Ibid. 70. pl. 107. S. C. in totidem verbis. — D. 124. a. pl. 38. Mich. 2 and 3 P. & M. Anon. S. P. and that no entail is

made by such will, but the fee simple descends to the son. [This seems to be the S. C. notwithstanding the distance of time.] — So where it was to the wife till the son's age of 21, remainder to the son in fee; per Gawdy and Fenner J. the son shall be adjudged in by descent, but Clench J. contra. 4 Le. 35. Bapool's case.

6. A. seised of lands in fee has issue two daughters, B. and C. and devised the lands to B. his eldest daughter, that she should pay 10*l.* to C. at such a day; the money was not paid; C. may enter into the moiety of the land. Le. 174. pl. 242. Trin. 30 Eliz. B. R. Crickmer v. Patterfon.

7. A. seised of lands in gavelkind has issue B. C. and D. and he devised to them, being his heirs by the custom, and their heirs equally to be divided among them; they shall be in by the devise; for now they are jointenants, and the survivor shall have the whole; whereas

*[348] Ibid. 315. S. C. — They shall not be in by descent

but they shall be jointenants or tenants in common. Goldsb. 28. pl. 14. seems to be S. e.

whereas if the lands should be held to descend they should be parceners, and so as it were tenants in common; and though the words subsequent, *equally to be divided among them*, makes them tenants in common, yet that does not mend the matter. Le. 112. pl. 254. Pasch. 30 Eliz. C. B. Bear's case.

3 Le. 128. S. P. in case of Hedger v. Row.—Ow. 65. Anon.—Goldsb. 88. pl. 14. S. P. Cur. Anon.

8. A. has two daughters who are his heirs, and devised his *land to his two daughters and their heirs*, and dies; per omnes J. they shall take as jointenants, for the devise gives it them, and for the benefit of the survivorship between them. Cro. E. 431. pl. 36. Mich. 37 and 38 Eliz. B. R. Anon.

—Ibid. 141. pl. 53. S. P.—Goldsb. 28. pl. 2. Mich. 28 and 29 Eliz. per tot.

9. If a man has lands in *borough-english* and *guildable lands* and has two sons, and devised all his lands *to his two sons* and dies, both of them shall take jointly, and the younger shall not have a distinct moiety in the borough-english, nor the elder in a guildable land, but they are both jointenants. Per Fenner. Ow. 65. Hill. 37 Eliz. Anon.

10. If one hath only two daughters, and devises his land to them in fee; they shall be in by devise as jointenants, and not by descent as parceners, but if he have but one daughter it is void. Goldsb. 141. pl. 53. Hill. 43 Eliz.

v Bulst. 61. S. C.—S. C. cited Pollexf. 578. and 2 Sand. 386. in case of Purefoy v. Rogers.—Pollex. 481. Trin. 27. Car. 2. B. R. in case of Fortescue v. Abbot

11. A. had *three sons, B. C. and D.* and devised *Black-Acre to B. Green-Acre to C. and White-Acre to D.* And that *if any of them died, the other surviving should be his heir.* A dies, B. died. Fleming Ch. J. thought Black-Acre would vest in C. and D. by way of remainder, and that they should take though the freehold by the descent of the fee was drowned. But all the others held, that in regard nothing but a freehold passed by the devise, the *reversion in fee descending upon B. had drowned the estate for life*, and that his death after could not revive and vest the remainder in C. and D. and adjudged accordingly. Cro. J. 260. pl. 21. Mich. 8 Jac. B. R. Wood v. Ingerfole.

observes that this case of Wood v. Ingerfole is also reported in 1 Bulstrode 61. There it is put that a man had three sons, and lands in three counties, and devised the lands in one county to one son, in another to the second son, and in the other to the third son, and that if any of his sons die, that then the one of them to be heir unto the other; in Crook it is, that the other surviving shall be his heir; so that as it is penned in Crook, it differs very much from Bulstrode; for if the words were as in Bulstrode, it is only one of them that was to be heir unto the other, therefore only one, and not both of the survivors could take; but as it is in Crook that the other surviving shall be his heir, it may bear a construction that both shall be heirs jointly. Now that this case in Crook is not very carefully reported, appears plainly; for the end of the case is plainly mistaken; for it is there said to be adjudged for the plaintiff, whereas it is apparent that it should be said for the defendant; next Crook's own report afterwards repeats the words differing from the case as he had before put it, and more agreeable with Bulstrode; for he afterwards repeats them thus in the distinct character, whereby he intends them the very words, that every one shall be heir unto the other, and upon view of the roll which is in Pasch. 7 Jac. R. 185. the words are, and if any of my sons die, the one to be the other's heir; then it will be very plain that these latter words will be void.

Hob. 30. S. P.—

12. If a man devise to his heir it is a void devise for the descent shall

shall be preferred. Per Doderidge J. Godb. 412. Trin. 21 Jac. 2 Sid. 53. Arg. S. P. B. R. in Sommer's case. —Ibid.

80. Per. Glinn Ch. J. S. P. —Unless it be of other estates than would have descended. Pl. C. 545. b. —But to the heir and a stranger, is good. Godb. 94. —Godb. 412. S. P. per Doderidge J. —And in such case they are jointenants for the benefit of the stranger. Godb. 94. pl. 105. Mich. 28 & 29 Eliz. C. B. —If a man may have any more benefit by the devise than by the descent, in such case he shall take by the devise. Per Periam. Goldsb. 88. pl. 14. Pasch. 33 Eliz. Anon.

13. A. has issue a son and a daughter by the same venter, and devised his lands to *his son and his heirs for ever, and for want of heirs of his son to his daughter and her heirs for ever*, and died, whether the son had estate in fee or in tail by this will? for he could not die without heir if his sister outlived him, who was to take according to the intent of A. and per two justices it is an estate tail in the son. The remainder to the daughter, who might be his heir, shewed that the devise to him and his heirs, could be intended only to be to him and the heirs of his body. But per three justices it is a *devise in fee*, but all agreed, if the remainder had been to a *stranger* it had been void, for then the son had an absolute estate in fee after which there could be no remainder, which Vaughan says is undoubted law. Vaugh. 269. cites Cro. C. 57 [pl. 1. Hill. 2 Car. C. B.] the case of Hearn v. Allen.

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Mutt. 85. S. C. adjudged accordingly. —S. C. cited Arg. Ld. Raym. Rep. 569. and by Holt. Ch. J. ibid. 570. Trin. 12 W. 3. —Litt. Rep. 5. Kene v. Allen. S. C. held by

three justices to be fee simple.

14. A father being seised in fee deviseth lands to *his son and heir, and to his heirs, upon condition that he should pay his debts within a year, and if he failed that his executors should sell and pay his debts*; he entered but did not pay the debts, and the executors entered and sold. Held this was assets by descent, for although the son hath a fee, yet he has it as a purchaser, being tied with such condition. Cro. C. 161. pl. 1. Mich. 5 Car. B. R. Gilpin's case.

S. C. cited and denied by Treby Ch. J. and Powell J. 1 Salk. 242. pl. 2. Hill. 10 & 11 W. 3. C. B. in case

of Clerk v. Smith, in which last case it was adjudged that where the same estate is devised to A. which he would have taken by descent. He is in by descent notwithstanding the possibility of a charge. —Comyn's Rep. 72. S. C. accordingly.

15. Devise to A. (*being heir at law*) for life, and if he die without issue living at his death, remainder to L. his younger son in fee, but if A. shall have issue living at his death, the fee to remain to A. Resolved, it is a contingent remainder, and until the contingency happen the fee descends to the heir in some sort, but not to confound the estate for life, but there shall be an hiatus to let in the contingency when it happen; so is Archer's case, and judgment accordingly. Raym. 30. Mich. 13 Car. 2. B. R. Plunket v. Holmes.

Lev. 11. S. C. adjudged per tot Cur. —S. C. cited 2 Vern. 449. —Sid. 47. pl. 6. S. C. adjudged.

16. A devise to *his eldest son and his heirs, within four years after the death of the testator, provided he pay 20l. to his executrix*, towards the satisfaction of his debts; he paid the money; adjudged, that he took by purchase and not by descent. 2 Mod. 286. Hill. 29 & 30 Car. 2. C. B. Britton v. Charnock.

But if a devise be made to A. and his heirs (who is heir at law) within four

years, it is a descent in the interim, and those words are void. Arg. 2 Mod. 286. in S. C.

17. Copyholder surrendered to the use of his will, and devised the lands to his wife and died. She was admitted to her and her heirs, and surrendered to the use of her will, and devised the same to her daughter, (who was her heir) and died. The daughter died before any admittance. Resolved that the daughter was in by descent, and so the land shall go the next of blood to the mother, and not of the next of kin of the daughter, not being next of kin to the mother. 8 Mod. 23. Mich. 7 Geo. Smith v. Trigg.

S. C. cited
Arg. 8.
Mod. 10.

18. Testator seized of lands descended from his grand-mother, bequeathed several annuities and charities, and then said that the residue of the profits should go to the right heirs of the mother's side; but proof being admitted, that he declared his mother's mother's heirs should have his estate, and the counsel objected that by this intending the heir of the mother's mother the will would be void and nugatory, because without any will the lands descend so. But Ld. Maclesfield said, it was only as if testator had said, viz. so far I dispose and let so much of it go from my heir, who otherwise would have it, but I will dispose of it no further from the heirs of the mother's side whence it came and where it must go, if I should not give it away. Besides, the words are not nugatory, because otherwise the trustees might be intitled, 2 Wms's Rep. 137, 138. Pasch. 1723. Harris v. Bp. of Lincoln.

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(Q. c) To the Heir on Condition.

1. A. Seised of gavelkind land has issue two sons, and devises to one of them, viz. the eldest, upon condition to pay 100l. at a certain day; the money was not paid at the day; if the youngest son may enter into a moiety upon his brother, by a limitation implied in the estate on non-performance of the condition. *Quere* per Manwood. D. 316. b. pl. 5. Mich. 14 & 15 Eliz.

2. A. devised lands to his wife for life, and after to his eldest son, with condition that if his wife should be with child 80l. should be paid by the eldest son and heir at law to the child, after his mother's death a child was born, and after the mother and son conveyed away the land to a purchaser, and upon notice proved of the will, a decree was made for the daughter for the 80l. and declared it was a trust devised to go with the lands, and yet this will was void in law as to this legacy, since he that was to have the benefit of the breach of the condition was the party, (as being heir) which should pay the legacy. 3 Ch. R. 93. 24 Car. 1. Smith v. Atterby.

3. A devise to an heir on condition is void in law, yet good in equity, as on condition that he sell, is void in law, but it is good by way of trust in equity. 1 Chan. Cases 177. 179. Trin. 22 Car. 2. Pitt v. Pelham.

4. Where the heir takes by a will with a charge as paying 200l. &c. he doth not take by descent, but by purchase. Per North Ch. J. and Atkins J. 2 Mod. 286. Hill. 29 & 30 Car. 2. C. B. Brittain v. Charnock.

confiningly.

Per
Rep. 208.
pl. 263.
S. C. the
court in-
clined ac-

ordingly.—And so shall the *heir of the heir*, the heir dying before the time of payment limited by the will. Mich. 1738. Decreed at the Rolls in case of Miles v. Leigh.

5. Lands devised to J. S. on condition to pay 20,000l. to the heir at law, viz. 1000l. per ann. till all be paid. The heir entered for non-payment as for *forfeiture*, and devisee was relieved; but interest was allowed from the time of failure. 1 Salk. 156. pl. 7. 1707. in Canic. Grimston v. Lord Bruce & Ux.

(R. c.) In what Cases the Heir or Wife shall take an Interim Estate.

1. A Man devised his land to be sold by his executor and died, and A. tendered money to the executor, and not to the value, and he refused, to the intent to sell it dearer, and held the land by two years and took the profits to his own use; the heir entered and well, per judicium, and held per Mowbray, the executor may sell as soon as he can, and in as short time. Br. Ent. Cong. pl. 124. cites 38 Aff. 3. [351]

Perk. S.
543. S. P.
and cites
S. C.

2. If a man devises his land to his executors to sell, there the heir cannot meddle. Br. Devise, pl. 5. cites 9 H. 6. 23.

Perk. l. 542.
S. P. and
cites S. C.

3. But if he devises his land to be sold by his executors there the heir may enter and take the profits till the executors have sold, and by the sale the vendee may enter upon the heir. Ibid. after the death of the deviser; and in this case the lessee for years of the deviser shall have aid of the heir, and not of the executors. Br. Devise. pl. 46. cites 13 E. 3. —In such case the inheritance shall descend to the heir and shall continue in him until they, viz. the executors sell, &c. and then the executors may enter, &c. and thereof insooth the vendee according to the sale. Perk. l. 541. cites 38 Aff. 3.

By this the
executors
have not
possession

4. A devise shall be taken according to the intent of the deviser; as if a man devise his goods to his feme, and that after the decease of his feme, his son and heir shall have the house where the goods are, there the son shall not have the house during the life of the feme; for now it appears that his intent was that the feme shall have the house also during her life, though it was not devised to her by express words, per Fineux; which all the justices agreed. Br. Devise pl. 52. cites 23 H. 7. 17.

S. C. cited
by Vaughan
Ch. J.
Vaugh.

263. and
he observes
upon it to
manifest a
difference
between an
implication

in a will that is necessary, and an implication that is not necessary, but possible only, that this was a devise of the house to the wife by necessary implication; for it appears by the will, that the testator's son and heir was not to have it until after the death of the wife, and then it must either be devised to the wife for life by necessary implication, or none was to have it during the wife's life, which could not be. And that though the goods were upon particular devise given to the wife and expressly, that was no hindrance to the wife's having the house devised to her also by her husband by implication necessary; which I the rather note, because men of great name have conceived, that where the devised takes any thing by express devise of the testator, such devise shall not have any other thing by that will devised only by implication. But the truth is, that is a vain difference that hath been taken by many. —S. P. Bridgm. 205. and cites 8. C. —S. P. per Raymond Ch. J. Raym. 453.

5. If a will be that the *feoffee shall alien* his land, the heir shall take the profits till the alienation be made and they be seised to his use, S. P. Br. Testament, pl. 7. cites 15 H. 7. 11.

use, and if the alienation be not made by them, the heir shall have the land for ever. Per Fineux, Reede, and Tremaine. Br. Feoffments at Uses, pl. 12. cites 14 H. 7. 33. & 15 H. 7. 11.

S. P. But where the land is devised to his executors to be sold, the descent is taken away and the executor may enter and take the profit. Co. Litt. 236. a.

6. A. devised that his executors shall sell his land; till the sale the heir shall take the profits and they are seised to his use, and if they do not alien the heir shall have the land for ever; per Read J. &c. Kelw. 45. a. Trin. 17 H. 7.

Same cases cited by Browne Pl. C. 158. —S. C. of 13 H. 7.

7. A man willed that J. S. shall have his land after the death of his feme, and died, now the feme of the devisor by these words shall have the land for term of her life, by reason of the intention of his will. Br. Devise, pl. 48. cites 29 H. 8.

cited by Popham, Pl. C. 521. a. ad finem.—S. P. agreed by all. Br. Devise. pl. 52. cites tempore H. 8.—S. C. cited Vaugh. 264, 265. by Vaughan Ch. J. who said that by this case and the case in Br. Devise 52. there is no excluding of the heir, and yet it is said the wife shall have the land during her life by implication, which is no necessary implication, as in the case of 13 H. 7. but only a possible implication, and seems to cross that difference I have taken before. But this case of Br. hath many times been denied to be law, and several judgments have been given against it. I shall give you some of them to justify the differences I have taken exactly as I shall press the cases.

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Hec. 78.
Wake-
man's case
S. C. in totidem
verbis.—Dal.
5. S. C. in
totidem
verbis.—

8. A man seised of a manor, parcel in demesne and parcel in service, devises to his wife for *all the demesne lands, and all the services, and chief rents for fifteen years; and devises the whole manor to another after the death of the wife*; resolved, that the devise should not take effect for any part of the manor till after the death of the wife, and that the heir of the devisor after the fifteen years spent, and during the life of the wife should have the services and chief rent. Mo. 7. pl. 24. Trin. 3 E. 6. Anon.

If the demesnes had been to his wife for life, and the services and rents for 15 years and the whole manor after the wife's life to A. and that after his wife's life and the life of A. his heir should have the demesnes and services and rents, in that case the wife would have the whole for life after the fifteen years expired, otherwise no one should have the rents, &c. after the fifteen years during her life, which was not to be intended. Per Vaughan Ch. J. on citing the case of Mo. 7. Vaugh. 265. in case of Gardener v. Sheldon.

The reason of the case of Mo. 7. is, that the words were express, and so no construction can be against them; but had it been that B. should have the manor after the fifteen years and after the death of the wife, then B. should have the demesne lands after the wife's death and the rents and services after the fifteen years. Per Sanders Arg. Sand. 186. Mich. 20 Car. 2. in case of Cook v. Gerrard.

4 Mod. 142. cites S. C. and that these words shall not carry it by implication to the wife because there was an express

9. A. seised of a messuage, and divers lands in fee, time out of mind occupied with the messuage, leases parcel of the land for years, and after devises to his wife, my messuage with *all the lands thereto belonging in the occupation of lessee, and after the decease of my wife, I will, that, it with all the rest of my lands shall remain to my younger son*; resolved the heir shall enjoy the land not leased during the life of the wife. Mo. 123. pl. 265. Pasch. 5 Eliz. Anon.

devise to her before of the other part.—2 Lev. 208. cites S. C.—Vaugh. 266. cites S. C. and Vaughan observes that Anderson Ch. J. at first grounding his opinion upon the case in Br. Devise, pl. 28. & pl. 52. was of opinion that the wife should have the land not leased by implication. But Mead was of a contrary opinion, for that it was expressly devised, that the wife should have the land leased; and therefore no more should be intended to be given her, but the heir should have the land not in lease during the wife's life. To which Anderson, mutata opinione, agreed. But

But Vaughan Ch. J. says, that hence perhaps many have collected, that a person shall not take land by implication of a will, if he takes some other land expressly by the same will; but that is no warrantable difference. For if the land in lease was devised to the wife for life, and after the death of the wife all the devisor's land was devised to the youngest son, as this case was; and that after the death of the wife, and the youngest son, the devisor's heir should have the land both leased, and not leased; it had been clear that the heir (exactly according to the case of 13. H. 7.) should have been excluded from all the land leased, and not leased, until after the death of the wife and the younger son. And therefore in such case the wife, by necessary implication, should have had the land not leased as she had the land leased by express devise, and that notwithstanding she had the leased land by express devise, for else none could have the land not leased during the wife's life. — Cro. E. 16. S. C. says it was adjudged that the wife should have it for her life. Pasch. 25 Eliz. C. B. Higham v. Baker. — 2 Le. 226. pl. 287. Higham's case. S. C. — 3 Le. 130. pl. 183. S. C. — Godb. 16. S. C. — S. C. cited Arg. — Wms's Rep. 39. in case of Phillips v. Phillips. — S. P. Ch. Prec. 439. Sympton v. Hornby. — G. Equ. R. 115. S. C.

10. If lands were devised to J. S. after the death of his wife, she shall have it for life. But if a man seised of *two acres* devises one of them to his wife, and that J. S. shall have the other acre after the death of his wife, she takes nothing in that acre; because the will took effect by the first words, cited per Anderson Ch. J. to have been so holden in the time of Brown. Godb. 16, 17. in pl. 23. Pasch. 25 Eliz.

11. If a man seised of *two acres* of land devises one to his wife for life, and that J. S. shall have the other after his wife's death, the wife has not any estate in the latter acre. For she has an express estate in the one acre and the will shall not be construed by implication to pass the other. Cited by Anderson Ch. J. to have been so held in Sir Ant. Brown's time. 3 Le. 130. pl. 183. Mich. 28 Eliz. C. B.

S. C. cited by Anderson as accordingly. Cro. E. 16. [353]

12. If the devise is waived or the devisee defers the execution of the devise, it is reason that the heir enter and take the profits till the devisee enters. But if a stranger abates after the death of the devisor and dies seised, the same shall take away the descent. 2 Le. pl. 239. Mich. 32 Eliz. C. B. 190. Sir Anthony Denny's case.

2 Danv. 564 (e.) makes a question of this difference.

13. Though a freehold will go to the wife for life by words or implication; yet it is otherwise of a term for years, because the devisor could not in his life make estate for life out of a term. Mo. 635. pl. 871. Hill. 34 Eliz. Raymond v. Gold.

14. Devise to S. from Michaelmas next for five years, remainder to A. and his heirs, S. dies before Michaelmas; this is a good remainder in contingency, because being in case of a will the freehold shall be in the heir of the devisor till the contingency happens. 4 Mod. 259. cites Noy. 43. Payn v. Ferrall.

Cro. E. 878. Pay's case. — 4 Mod. 284. cites S. C.

15. A. devised land to B. for years to commence at the next Michaelmas after the death of the testator, remainder to C. and his heirs. A. died before Michaelmas. The question was, whether this is a good remainder? it is plain it could not vest eo instanti, that the particular estate determined, because of the term for years coming between those estates; but it being in the case of a devise, it is good as an executory devise and the freehold in the mean time shall descend

Noy. 43. Payne v. Ferrall. S. C. adjudged. — Cited 4 Mod. 283. — S. C. cited Arg.

Cases in scend to the heir of the devisor. Cro. E. 878. pl. 8. Pasch. 45
 Chancery Eliz. B. R. Pay's case.
 in Ld. Tal-
 bot's time, 48. and by the Chancellor. 51. Mich. 1734. in case of Hopkins v. Hopkins. And said
 that had the testator lived till Mich. the limitation had been a remainder.

16. Wadham made a lease for years upon condition that the lessee should not alien to any besides his children, the lessee deviseth the term to H. his son after the death of his wife, and made one Marshall and another his executors and died; the lessor entered as for a condition broken supposing this a devise to the wife of the term by implication. But it was held *this was no devise by implication*, but the executors should have the term until the wife's death, but if it had been devised to the executors after the wife's death, the executors should, when the wife died, have had the term as legatees, but until her death they should have it as executors generally. Cro. J. 74, 75. pl. 4. Trin. 3 Jac. B. R. Horton v. Horton.

17. A. devised that J. S. shall have his lands after the death of J. N. J. N. being a stranger, he shall not take by this devise; otherwise it is, if A. devised that J. S. shall have his lands after the death of his wife. Arg. 2 Sid. 53. Hill. 1657.

Cited 2
 Mod. 292.
 in case of
 Taylor v.
 Biddal.

18. When the devise is to an infant when he shall be born, or to a daughter when she shall be married, it shall descend to the heir in the mean time; per Cur. Sid. 153. Mich. 15 Car. 2. B. R. Snow v. Tucker.

19. A. tenant for life, reversion to B. B. devised the reversion to J. S. when he shall marry my daughter. Tenant for life dies, it shall descend till J. S. marry her. 1 Keb. 802. per Hale Ch. J. and Windham J. in pl. 70. Mich. 16 Car. 2. B. R.

Saund. 186.
 S. C. adjudged
 accordingly,
 and upon error
 brought in
 the exchequer
 chamber judg-
 ment was
 there affirmed
 — 1 Keb. 206.
 pl. 44. S. C.
 adjournatur.
 — Ibid. 224. pl. 76. S. C. and the court agreed to the words are to be taken
 distributively.

20. Devise of land to A. for life, and of a house to the wife for one year, then devises all his lands not settled or devised to W. R. habend. to W. R. and his heirs after a year after testator's death, and after the death of A. Testator dies, and the year expired. A. is yet living and daughter and heir of testator and brings ejectment for the *house. But it was resolved that the words after the year and after the death shall be construed distributively, and the heir shall take no interim estate, and so W. R. shall take immediately after the year. 1 Lev. 212. 1 Pasch. 19 Car. 2. B. R. Cook v. Gerrard.

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21. A. the husband on marriage covenanted to settle 200 l. a year on M. his intended wife for life, and if he should die before such jointure settled, then she was to have so much out of lands chargeable with dower as would fully recompence the 200 l. a year. A. by will devised 200 l. rent-charge to M. for life, to be issuing out of R. S. and T. in full satisfaction of the said articles and dower, and devised the said farms to E. his grandchild to have immediately after the death of M. his wife; and by a subsequent clause

be

he devised all the lands (not therein before disposed of) to B. his son for life, remainder over. M. claimed the 200l. rent-charge, and also the lands out of which it issued, without extinguishment of the rent, by reason of the words (to have and to hold after the death of M.) but the court declared that they saw no colour to decree both, but only the rent-charge. 2 Ch. Rep. 63. 23 Car. 2. Kemp v. Kemp.

22. Estate in fee was devised to A. and his heirs *after the death of devisor and wife*. Devisor dies. A. who is a *stranger* shall take nothing till the wife is dead, but it shall descend to the heir in the interim. 2 Lev. 207. Mich. 22 Car. 2. B. R. Smartle v. Scholar.

2 Jo. 98. S. C. resolved accordingly notwithstanding no land was ex-

pressly devised to the wife.——Vent. 323. S. C. held accordingly, per tot. Cur. for an heir shall not be defeated but by a necessary implication.——S. P. by Raymond J. Raym. 453, 454.

23. Lands devised to A. his sister and heir till B. her son is 22, and after B. attains that age to B. and his heirs, and if B. dies before 22, &c. The fee is vested in B. immediately, and A. had only an estate for years till B. be 22. 2 Mod. 289. Hill. 29 & 30 Car. 2. C. B. Taylor v. Biddolph.

Freem. Rep. 243. pl. 256. S. C. & S. P. held accordingly; but says it was

agreed, that if the devise had been to B. when he comes to 22 years and no devise made to A. the mother, then in the mean time she had been in by descent.——S. P. held that the heir shall have the fee in the interim. 1 Le. 101. Gates v. Holywell.

24. A devise to J. S. a *stranger* durante exilio, &c. and afterwards to W. R. another stranger in fee. Though this was held a good devise to J. S. yet upon a supposition that durante exilio was a void limitation to J. S. as being of an unknown sense in our law (which it is not) then W. R. cannot claim till the death of J. S. and in the mean time the land would descend to the heir at law. Vent. 326. Hill. 29 & 30 Car. 2. B. R. in case of Paget v. Dr. Vossius.

2 Lev. 191. S. C. adjudged.——2 Mod. 223. S. C. adjudged.——2 Jo. 73. S. C. adjudged.

25. Lands devised to a stranger for 20 years after the death of his wife, they shall descend to the heir in the interim; but had the devise been to the heir at law for 20 years after the death of the wife, there the wife had estate for life by implication; per Lord Nottingham. Vern. 22. pl. 14. Mich. 1681. Fawlkner v. Fawlkner.

Vent. 323. Smartle v. Scholler S. P.——2 Lev. 207. S. C. & S. P.——S. P. Vaugh. 263. cites

13 H. 7. 17. Br. Devise 52.——Cro. J. 74. Horton alias Burton v. Horton.——But where such constructions will make a *forfeiture* it is otherwise. Arg. cited Roll. R. 398. as Horton's case.——3. Bulst. 193. S. C. cited in case of Webb v. Harring.——So if the devise was to the second son after the death of the wife, she should have an estate for life by implication; per Croke J. 2 Bulst. 127.——2 Show. 137. * cites 13 H. 7. 17. b. S. P.——Lord Keeper said, that a devise of land to the heir after the death of the wife by a necessary implication gives an estate for life to the wife, because the heir was not to take till after her death. 2 Vern. 571. 572. Hill. 1706. in case of London (city) v. Garway.

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26. By common law one might devise that his executor should sell his land, and in such case the vendee is in by the will, and the fee descends to the heir in the mean time; per Powell J. 1 Salk. 230. Trin. 9 W. 3. C. B. in case of Scatterwood v. Edge.

Ch. Prec.
167 S. C.—
S. C. Wms's
Rep. 34. to
41. Patch.
1701. states
it that B.
was heir at
law of testa-
tor, and
thereupon
it was in-
fisted that
thence
arose a plain
and neces-

sary implication that M. should have it for her life; and the reporter notes the different opinion on the case, viz. The Master of the Rolls held that M. and B. were joint tenants, and that all survived to M. Afterwards on appeal Ld. Spmrs held that M. and B. were tenants in common, and that B's estate determining by her death, the remainder man or reversioner had a right to that moiety. Afterwards Ld. K. Wright was of opinion that an estate by implication arose to M. in B's moiety after B's death. But upon referring it to the court of C. B. they conceived that B. and M. were tenants in common, and that M. had an estate puer auter vie, which upon the statute of frauds (that takes away occupancy) ought to go to B's administrator, viz. M. the mother, and that B. had not an estate tail in trust; for that mergers are odious in equity, and never allowed unless for special reasons.

27. A trust by devise was, that the profits should be equally divided between M. his wife and B. his daughter during the life of M. and after M's death to the use of B. in tail, remainder over. B. died without issue living M. This by the opinion of the judges of C. B. to whom it was referred, is a tenancy in common between M. and B. so that M. has no title to B's moiety either by survivorship or implication, nor does that moiety either descend or result to the heir; but as to that moiety during M's life it was an interest undisposed of, and in nature of a tenancy pur auter vie, and consequently belonged to the administrator of B. and decreed accordingly. 2 Vern. 430. pl. 392. Hill. 1701. Philips v. Philips.

28. Where an estate is created by implication it must be a necessary implication; as a devise to the heir after the death of the wife, the wife takes by way of implication of necessity, because it is plain his intent was that the heir should not have it till after her death; per Ld. Keeper. 2 Freem. Rep. 270. Trin. 1703.

A. devised
lands in B.
C. and D. to
his wife for
life for her
jointure,
and towards

the end of his will devises all his lands tenements, &c. in B. C. and D. after the death of his wife to his daughter M. and the heirs male of her body, and for want, &c. then to his other daughter N. &c. Ld. Cowper thought the wife took no estate for life: for an implication to disinherit an heir at law must be necessary, which in this case it was not, because it may be intended to extend only to the lands expressly devised to the wife for life, that they should not have those till after her death. Ch. Prec. 439. Simpson v. Hornby. S. C.—G. Equ. R. 115. S. C.—Ch. Prec. 452. S. C. and there it is reported, that the lands devised to the wife for life was expressed to be for her jointure and in full of all claims and demands whatsoever both in law and equity, and after that the devise was that after the death of the wife all the lands, &c. reversions, &c. and hereditaments whatsoever not before disposed should be to M. Ld. Cowper held that the words should be taken distributively, viz. All the lands given to his wife to go to M. after the wife's death, and all the rest immediately.

Wms's
Rep. 472.
Trin. 1718.
S. C. & S.
P. by Ld.
C. Parker.

30. J. S. had three sons, A. B. and C. and also two daughters, and being seised in fee of land, part whereof is gavelkind, devised it to C. his youngest son, he or his heir paying 10 l. a year to A. and 10 l. a year to B. and 5 l. a-piece to the daughters for term of his life, after the death of C. and his wife, then it was to go to the sons and daughters of C. accordingly as he should have one or other, equally to be divided between them; C. dies, living his wife. Parker C. was of opinion that the wife ought to have an estate for life by implication, the heir at law being excluded by the annuity, but directed an issue at law. 10 Mod. 416. Trin. 4 Geo. in Canc. Willis v. Lucas.

(S. c) Of Devises by Implication ; And what is a Devise by Implication.

1. **O**NE devised all his goods, jewels and plate, excepting his lease in C. It was adjudged that all his other leases passed.

Arg. Sty. 262. cites 4 E. 3. Br. Grants, 51.

2. A man made his will in this manner, *I have made a lease to J. S. paying but 10 s. rent*; this was held a good lease. Mo. 31. pl. 101. Trin. 3 Eliz. Anon. Dal. 34. pl. 24. S. C. — 2 Vent. 57. in case

of Wright v. Wyvel, by three justices, contra Powell, this case denied. — 3 Lev. 259, 260. S. C. and Mo. 31. pl. 101. denied by three justices, contra Powell.

3. A. made a feoffment in fee to the use of his last will, and devised that his *feoffees should be seised to the use of M. his wife for life, and after to the use of B. his son for life*, without impeachment of waste, and *after the death of M. and B. and D. wife of B. then, &c.* It was held that a use implied was limited to D. Le. 257. pl. 345. 18 Eliz. B. R. Manning v. Andrews. Cited Arg. 2 Vent. 57.

4. A. devised that his executors should assign his lands to J. S. this by implication is a devise of the lands themselves to the executors, for otherwise they cannot assign. Arg. 2 Le. 165. pl. 108. Pasch. 26 Eliz. B. R. in the case of Foster v. Walker, alias Walter.

5. A. wills and devises that B. shall pay yearly out of his manor of D. to J. S. 10 l. It is a good devise of lands to B. Arg. 2 Le. 165. in case of Foster v. Walker, alias Walter.

6. A. having two sons devised part of the lands to the eldest in tail, and the other part to his younger son in tail, and adding, that if any of his sons died without issue, that then the whole land should remain to a stranger in fee, and died; the sons entered; the youngest son died without issue, the devisee in fee entered, and his entry was not lawful, for the eldest son shall have the land by the implicative devise. 4 Le. 14. pl. 51. Mich. 32 Eliz. C. B. Anon.

7. A. devised that his executors shall have his term until his son John shall come to the age of 21 years; when his son John comes to the age of 21 years, he shall have the term by implication. Per Coke J. 2 Bull. 127. Mich. 11 Jac. in case of Roberts v. Roberts.

8. A devise of an estate with a perpetual charge, doth not make a fee-simple by implication, as a devise of eight marks every year out of such an house to maintain a chaplain, and the residue of the profits of the house to buy ornaments and books of the church, yet this is not a devise of the house by implication. Bridgm. 103. Mich. 14 Jac. in Scacc. Standish v. Short.

9. By the bequest of the moiety of a personal estate where the testator had money, bonds, and a lease for years, a moiety of the lease passed. Chan. cases. 16 Mich. 14 Car. 2. Lee v. Hale.

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10. My will and meaning is, that if it happen that my son George, Mary, and Katherine my daughters do die without issue of their bodies lawfully begotten, then all my free lands, which I am now possessed of, shall come remain and be to my nephew William Rose and his heirs for ever; Geo. entered and died, leaving two daughters Judith and Margaret; who after George's death entered. Mary dies, Katherine survives and makes a lease to the plaintiff, but judgment was given for the defendant; for it was held that no estate was devised to the son or daughters by express and implicit devise, neither is there any estate by implication given to them, for then it must be a joint estate to them for their lives, with several inheritances in tail, and several estates tail to them in succession, and such an intail it cannot be, because it appears not by the will who should take first and have such estate, and who next, and therefore such an estate tail is merely void for the uncertainty of the person first taking. And it cannot be a joint estate for their lives, with several inheritances to them in tail, for the law doth not regularly admit estates to pass by implication, as being a way of passing estates not agreeable to the plainness required by law, and though an estate by implication of a will, if it be to the disinheriting of the heir at law, is not good, if such implication be not a necessary implication, but only constructive and possible, as when it may be intended the testator had a mind to devise the estate to A. or it may be reasonably intended otherwise. But when A. must have it and none else can have it, this is a necessary implication, and the testator's intent ought not to be construed to disinherit the heir where his intention is not apparently.

* [but only] ambiguously to the contrary. Vaugh. 259, 260. Hill 20 & 21 Car. 2 C. B. Gardner v. Sheldon.

11. A man devises his lands in these words, I devise all my lands in Meynell Langley unto my two daughters, Eliz. and Ann, and their heirs, equally to be divided between them, and in case they happen to die without issue, then I give and devise all my said lands to my nephew S. M. eldest son of my brother W. M. and to the heirs male of his body, with divers remainders over. Ann dies. Eliz. survives. And adjudged that Eliz. shall hold Ann's moiety to her and to the heirs of her body, by way of remainder by implication. 2 Jo. 172. Mich. 33 Car. 2. B. R. Holmes v. Mynell.

* The original is [not.]

2 Show. 136. pl. 11, S. C. adjudged. Skin. 17. pl. 19. S. C. adjudged for the sister; for Pemberton Ch. J. said, that being a devise it shall be governed by the intention of the parties, whether there were legal words or not, and such as nature and prudence would direct; so that to construe it so as to give the land from the testator's own child to one more remote would be to construe against nature; besides the words are not satisfied unless they are so taken, for (if they die without issue) cannot be satisfied by one's dying without issue; besides, by the words (all his lands) he intended that S. M. should take all when he did take; though he agreed, that in a grant it would be otherwise.

3 Vent. 56. S. C. held accordingly.

12. A. devised to his wife 600 l. to be paid to J. S. in full for the purchase of Black-Acre already settled on my wife for part of her jointure; the lands were not settled; per 3 J. against Powell J. this is not a devise of them by implication. 3 Lev. 259. Trin. W. & M. in C. B. Wright v. Wivel.

13. In case of implicit devises there must be no reference to any act that should have conveyed the land to the devisee before the will,

will. But the will must pass the land by construction and implication. 2 Vent. 56. Trin. 1 W. 3. C. B. Wright v. Wyvel.

14. Where-ever land is *expressly devised*, no implication, though ever so strong, shall carry it otherwise. 4 Mod. 142. Arg. Trin. 4 W. & M. in the case of Bagnall v. Abbot, cites Cro. E. 15. [the case of Higham v. Baker.]

Yet see 3 Mod. 103. South v. Allen. And. 5 Mod. 62.

Buff v. Allen. 3 Le. 71. Anon. D. 326. Marg. pl. 1. 2 Vern. 60. Smith v. Clever. Pasch. 1688. an estate by implication cannot be against the plain intent of the party expressed in his will; per the Master of the Rolls.

15. An implication in a devise to *disinherit the heir male, even at law, be a necessary implication*. Arg. and agreed to by the Ld. Chancellor. Chan. Prec. 384. Pasch. 1714. in case of Boutel v. Mohun.

Gilb. Equ. Rep. 39. 41. S. C. in totidem verbis.

(T. c) To Creditor or Legatee, Where it is a Satisfaction. [358.]

1. A. seized of lands of inheritance of 360 l. per ann. whereof M. the wife of A. was joint-purchaser with her baron of 60 l. per ann. A. by his will declared that M. should have during her life the *third part of all his lands, together with the lands which she had in jointure*, the said part to be assigned by his executors, and dies. M. *refuses the jointure of 60 l. per annum*, and demanded the third part of all the said land, viz. 120 l. as legacy by the said will, and also the third part of the residue, viz. 60 l. as her *dower*. Decreed in the court of wards that she should have the legacy of the whole 120 l. viz. the third part of 360 l. and that she should have her dower also. D. 61. b. pl. 31. Pasch. 38 H. 8. Whorwood v. Lisle.

S. C. cited. 3 Rep. 28. a. in case of Butler v. Baker.

2. Baron made *jointure during coverture* to his wife, and devised to the wife for life a manor over and *besides the jointure* and dies; she *waves* the jointure. Adjudged that she shall * not have the manor, for it was devised to her for the enlargement of her jointure, and so was the intent of the baron. Cited to have been so adjudged 5 & 6 E. 6. D. 61. b. pl. 31. in marg.

* In the original it is as here, but seems misprinted for (shall.)

3. A. devised 20 l. to B. *in performance of a covenant to pay the like sum* to B. Per Anderson and Periam J. This is no legacy, but the will refers to the covenant, and is in discharge of the covenant and it is but a declaration that the will of A. is that the debt shall be paid. 2 Le. 119. pl. 164. Mich. 29 & 30 Eliz. C. B. Davis v. Percie.

4. A. *covenanted to pay B. and C. 10 l. at their ages of 24.* Afterwards he made his will and *devised to B. and C. 10 l. to be paid at 21, in performance of this covenant*. This devise is not accumulative. Mo. 426. pl. 385. Mich. 29 El. C. B. Margery Davis's case.

5. A.

5. A. entered into a statute to make his wife a jointure of 50 l. per annum; he devised 52 l. per annum to her and her heirs. There being no proof but only conjecture that this was intended as a gift, the court declared it to be in lieu of her jointure, and decreed the statute to be delivered up and cancelled. Chan. R. 46. 6 Car. 1. Peacock v. Glascock.

6. The grandfather deviseth lands to his son to pay 10 l. per annum to the son's three daughters; the father gives 200 l. in marriage with one. Whether the 10 l. per annum shall be included? Toth. 141. Mich. 13 Car. Kinington v. Aftry.

7. The earl of R. bequeathed 500 l. to the plaintiff to be paid at the age of 21 years or day of marriage; but before either, the defendant paid the said 500 l. to her father upon condition he would make it 1000 l. which he covenanted to do; and afterwards, by his will he devised unto his said daughter 1000 l. to be paid unto her at the respective times as aforesaid, and died without mentioning that he devised the said 1000 l. in pursuance of the aforesaid covenant; and now, after her father's death she exhibited her bill against the defendant for the 500 l. but it was dismissed. Nelf. Chan. Rep. 31. 15 Car. 1. Willoughby v. Rutland.

8. If A. promise B. to give to C. as much as he shall give to any of his kin, and afterwards A. makes C. his executor and dies, this is no performance of the assumpsit, inasmuch as C. has this as executor. It was so said. Sid. 25. pl. 6. Hill. 12 Car. 2. C. B. in the case of Shipston v. Booter.

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9. The testator giveth 3000 l. a-piece to daughters by marriage settlement, and afterwards cuts off the intail of his estate, and by his will gives the same daughters 3000 l. a-piece. The plaintiff, the heir, insists that the marriage settlement and will make but one settlement, and the 3000 l. in both is but one 3000 l. This court, with the assistance of the judges (it appearing by proof that the testator declared after the marriage settlement that he would add to his daughters portions) were of opinion and declared he cut off the intail on purpose to add to the portions, and that the said 3000 l. in the marriage settlement and the said 3000 l. in the will made 6000 l. a-piece, and they could not expound the deeds and will otherwise, and so dismissed the plaintiff's bill. Chan. Rep. 199, 200. 13 Car. 2. Pile v. Pile.

10. The husband entered into a statute staple to pay his wife 500 l. if she survived, and afterwards he devised several lands to her for life, and some in fee, and made her sole executrix, &c. She possessed herself of the personal estate, but procured the statute to be extended after the death of her husband for the 500 l. and this was against the heir at law, who was relieved if it should appear before a master, that the personal estate of the testator, and the rents by her received of his real estate shall amount to more than 500 l. but if there be any deficiency it shall be supplied by the statute. Fin. Rep. 42. Mich. 25 Car. 2. Mason v. Cheyney.

11. A. was surety for B. B. being seised of lands devises them to C. (his wife) and her heirs, provided if A. pay C. within 5 years after B's death 1000 l. to enable C. to pay B's debts, then C. was to convey

convey the premises to A. in tail to take effect immediately after A's decease. A. shall not out of the 1000l. retain for the debt for which he was bound for B. and so have a priority. Fin. R. 312. Trin. 29 Car. 2. -Puleston v. Puleston.

12. A. entered into bond to leave B. a third part of his personal estate. A. makes his will and leaves three executors, of which B. is one. The court seemed to think that this was not a performance, but that there an express gift of a third part was necessary to answer to the condition. 2 Jo. 133. Hill. 31 & 32 Car. 2. B. R. Impey v. Pitt.

13. B. was surety for A. to several persons, and had supplied him with money of his own. A. gave B. a judgment for 3000l. and about five years afterwards A. defeasanced the said judgment thus, viz. *If A. should die without issue*, then his heirs general, or his executors or administrators should within one month after his death pay to B. his executors, &c. 3000l. or settle freehold lands of that value on B. and his heirs. By will made a twelve-month before the judgment was entered into, A. had devised a farm of 60l. per ann. to B. in fee. On a bill to set aside the judgment, the debts being paid, for which B. was surety, an issue at law was tried and found that the defeasance was the act of A. only, and not of B. and decreed according to the judgment, but the farm devised to be quitted, or else to be reckoned as part of the satisfaction. Fin. R. 454. Trin. 32 Car. 2. Blois v. Man.

14. Speake was indebted to his mother for arrearages of an annuity of 500l. per annum 3000l. and makes her executrix, and by will devises as much land as is worth 20000l. and devises his jewels to his wife. The question before North Ld. Keeper, was whether mother, being executrix, may retain the jewels towards payment of the debt; or else, whether the debt shall be included in the 20000l. worth of land, the personal estate not being sufficient to pay the debt? and my Ld. Keeper held, that inasmuch as the personal estate was not sufficient, the lands should go in discharge of the debt, and the specifick legacy shall not be lost; but if there were not enough besides the legacy to pay the debt, then she might retain. Skin. 158. pl. 5. Hill. 35 & 36 Car. 2. B. R. Speake v. Bedley in Chancery. [360]

15. A. on marriage with M. jointures his estate on M. remainder to the issue of the marriage. Afterwards A. sells to B. the same estate, and by B's direction conveys it to B. and C. in trust for B. who gives a judgment to A. for 1200l. the purchase money. B. and C. sell to D. and covenant in consideration of 1300l. to convey or to pay back the 1300l. to D. B. and C. convey to D. but afterwards D. is evicted by M. by means of the marriage settlement. D. makes M. his executrix and dies. B. shall pay back the 1300l. to M. as executrix of D. and she shall have that and her jointure too. Vern. 284. Hill. 36 Car. 2. Jason v. Jervis.

16. A. on marriage settles a rent charge on his wife for a jointure, and afterwards devises to her part of the land which was charged with the rent charge; per Jefferies C. she may distrein in all or any part of the lands for her rent and denied to apportion the rent charge, but

but dismissed the bill. Vern. 347. pl. 342. Mich. 1685. Knight v. Calthrope.

17. A. in consideration of 50l. portion, articles to settle a *jointure* after marriage, but before the 50l. paid or settlement made, died *intestate*—The *widow administers* and thereby becomes intitled to the 50l. and brings her bill against the heir of her husband to have her jointure according to the marriage articles. Per Jefferies C. she shall not have *the portion as administratrix and also the jointure* too, which was agreed to be made in consideration of the money, and in expectation that the husband should have received it, and dismissed the bill with costs. Sed de hoc quære. For she is intitled to these two demands in distinct capacities, and the debts may appear hereafter to exhaust the assets; and if the husband had actually received the 50l. and it had been in his possession she would have had it as his administratrix. Vern. 463. pl. 443. Trin. 1687. Meredith v. Jones,

18. A. settles lands to raise 5000l. for daughters, whereof 2000l. to the eldest; afterwards having no issue male, A made his will and devised that all his lands (except the lands charged with the 5000l. which were partly jointured on his wife, and which he devised to her for life, only charged with 100l. annuity to his sister, and then that those lands also) should descend to his four daughters equally, and that the lands devised to my wife, or jointured on her formerly shall not be charged with any portions to my said daughters by virtue of any marriage settlement; decreed per Ld. Commissioners, that the eldest should have 1000l. more than the other three. And if the other three sisters did not agree to pay her the 1000l. out of their shares of the land devised, then the trustees were to raise the money according to their power, and in such case the mother to be re-imburshed out of the inheritance what her estate for life should be damnified. Ch. Prec. 5. pl. 4. Hill, 1689. Ld. Treviot v. Spencer.

19. In 1690, a bill was brought to have 3000l. provided for daughters portions on failure of issue male by an old settlement in 1631. The brother of the plaintiffs who might have barred them by a recovery giving them by will above the value of 3000l. it shall be intended a satisfaction. Per Commissioners. 2 Vern. 177. pl. 161, Mich. 1690. Smith v. Duffield.

20. By marriage settlement in case of failure of issue male, a remainder is limited to daughters until three thousand pounds paid. There is issue a son and two daughters; the father by will gives seven hundred pounds a-piece to the daughters. The son by his will gives seven hundred pounds a-piece to his two sisters and makes them executors, and residuary legatees by which they got about seven thousand pounds, and devises the lands comprised in the marriage settlement of about two hundred pounds per annum to the plaintiff, who was cousin german and heir male of the family, and dies without issue. By two commissioners, against one, the provision by the brother's will is a compensation for the three thousand pounds by the marriage settlement and they are not to be considered as heirs, but as mortgagees, and cited the cases of Blois v. Blois, Yeomen v. Brooks, Dekins v. Powell, Jesson v. Jesson, Osbaston v. Strick-

S. C. cited
a Vern. 354.

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v. Strickland, &c. But this decree was afterwards reversed on appeal to the House of Lords. 2 Vern. 266. Pasch. 1692. Duffield *v. Smith*.

21. A. on marriage of B. with C. his daughter gave bond to B. for C's portion, A. devised several lands of such great value to B. and C. and their heirs, and makes B. executor. Per Cur. Cases of this nature depend on circumstances, and where a legacy has been decreed to go in satisfaction of a debt, it must be grounded on some evidence, or at least a strong presumption, that the testator did so intend it, but it appeared here A. intended to give all he could to B. and C. and to defraud his creditors, so cannot presume the devise of the lands intended in satisfaction of the bond debt. 2 Vern. 298. pl. 288. Trin. 1693. Goodfellow *v. Burchett*.

22. A. by his will devised some legacies out of his personal estate to his wife, and devised to her part of his real estate during her widowhood, and devised the residue of his estate to trustees for twenty one years for payment of debts and legacies; the remainder of the whole estate he devised to the plaintiff (who was his godson and of his name but a remote relation) and to his first and other sons in tail, &c. Sommers C. was of opinion, that although what was given to the wife was not declared to be in lieu and satisfaction of dower, and although no estate for life was devised to her but only during her widowhood; yet that in equity it ought to be taken that what was so devised was intended to be in lieu and satisfaction of dower and that it might be plainly collected and intended from the will that it was so intended, because he has thereby devised all other his real estate to other uses; and a collateral satisfaction may be a good bar to dower in equity, though not pleadable at law, and decreed that she must either take her dower, and wave the devise, or accept the devise, and wave her dower. This decree was afterwards reversed by Ld. K. Wright. 2 Vern. 365. Mich. 1699. Lawrence *v. Lawrence*.—And the reversal affirmed in the House of Lords, 17 May, 1717. Abr. Equ. cases 218.

his debts paid. The devise is not to be looked upon as any recompence or bar of dower, but a voluntary gift. Ch. Prec. 133. Per Ld. Keeper. Mich. 1700. Hitchin *v. Hitchin*.—S. C. 2 Vern. 403. but no decree. Hilchins *v. Hilchins*.

S. C. cited per Master of the Rolls Trin. 1731. in the case of Eastwood *v. Vinke*, or Styles,—A. being indebted made his will; and thereby devised several lands to his widow, but did not mention it to be in satisfaction of her dower, and devised the residue of his lands to his executors till

23. Sir R. B. having issue only daughters settled his estate upon trustees to sell, subject nevertheless to a power of revocation; afterwards upon the marriage of his daughter with the plaintiff by deed reciting that his intent was, that the manor of C. in question should go to the issue male of the plaintiff, he thereby agreed, that if the plaintiff should be minded to purchase the same to him and his heirs, he should have it for 1500 l. cheaper than the best purchaser would give for the same. Sir R. B. afterwards made his will and gave the complainant 1500 l. to be raised out of his manor, but did not mention whether it should be in satisfaction of the 1500 l. agreed to be allowed the plaintiff in case he would purchase the same. Whether this 1500 l. given by the will, should be intended in satisfaction of the 1500 l. mentioned in the agreement, or whether Mr. B. should

Ch. Prec. 138. pl. 121. Bromley *v. Jefferies*. S. C. & S. P.

B. should have both? and it was clearly held, that he should not, inasmuch as the 1500l. * is to be raised out of the same lands, and the lands are thereby otherwise disposed of, so that it could not be intended by Sir R. B. that he should have both. 2 Freem. Rep. 245, 246. pl. 315 Hill. 1700. Bromley v. Fettiplace.

24. A legacy of 150l. given by a collateral ancestor to the daughter of A. which was paid A. and who after gave her a 1000l. portion, settled a church lease on her, and maintained her and her husband fourteen years; yet held no satisfaction. Chan. Prec. 228. pl. 187 Hill. 1703. Chidley and Ux. v. Lee.

Chan. Prec. 236. S. C. decreed that she should have both; for that given by the will was not so advantageous to her as the other in respect of the times of payment, of the difference of the places, and the being liable or not to taxes.

25. A. gives bond to B. her servant to pay her 20l. per annum quarterly for her life, free from taxes and by will without taking notice of the bond, gives B. 20l. per annum for life, payable half yearly; but not said free from taxes; decreed the annuity by the will not to be a satisfaction of the bond, and that B. should have both the annuities. 2 Vern. 478. pl. 433. Hill. 1704. Atkinson v. Webb.

A. bequeathed 500l. to M. the daughter of J. S. to be paid at twenty-one or marriage, but before either, the executor paid it on condition he would double it and make it 1000l. which J. S. covenanted to do. The father devised 1000l. to M. payable as aforesaid, without saying it was in pursuance of the covenant. M. brought a bill against the executor for the 500l. but it was dismissed. N. Ch. R. 38. 15 Car. 1. Willoughby v. Rutland (Earl.)

26. A. devised his estate to B. his son charged with five hundred pounds to C. the daughter of B. payable at twenty-one or marriage, on the marriage of C. with D. B. gives one thousand five hundred pounds portion, but nothing said of the legacy or any release given. D. dies and C. marries E. — C. and E. twenty-one years after sue for the five hundred pounds. For the plaintiffs was cited the case of CHUDLEY v. LEE, where a greater portion was given, yet afterwards a legacy decreed to be paid, not being taken notice of in the marriage agreement. But the bill was dismissed it being to be presumed that the one thousand five hundred pounds was intended in satisfaction of the five hundred pound legacy, especially after this length of time. 2 Vern. 484. pl. 439. Hill. 1704. Macdowell and Ux. v. Halfpenny.

Chan. Prec. 340 pl. 201. S. C. mentions two notes, and held the devise a satisfaction of the notes — S. C. cited 2 Wms's Rep. (615) (616) Arg.

27. A. on his wife's joining in sale of part of her jointure gives her a note to pay her 7l. 10s. per annum for her life, and afterwards on sale of a farther part, gives her a bond to pay her 6l. 10s. per annum for her life; and by will without taking notice of the note or bond gives her 14l. a year for her life. The devise shall be a satisfaction of the bond and note. 2 Vern. 498. pl. 448. Pasch. 1705. Brown v. Dawson.

28. A. on his marriage, covenants to purchase and settle 20l. a year on his wife for her life, and if he died before it was done to leave her 300l. out of his personal estate for her better livelihood and main-

maintenance. *He died without making any settlement, and by will gives his wife the interest of 330 l. with a power to dispose of 30 l. at her death.* Decreed first that she was intitled to the 300 l. by the articles, and that the executors were not at liberty to settle 20 l. a year on her for her life. Secondly, that the legacy was not a satisfaction of the articles, but she should have the 300 l. by the articles and the legacy too. 2 Vern. 505. pl. 454. Trin. 1705. *Perry v. Perry.*

29. A. by marriage articles agrees to leave his wife eight hundred pounds and her jewels, &c. and that notwithstanding any thing in the articles she should not be debarred of any thing A. should give her by will or writings, &c. A. devised one thousand pounds to the wife, and disposed of all his estate. Per Ld. Chancellor, the wife must waive the articles or the will, if she will take the benefit of the will she must suffer the will to be performed throughout. 2 Vern. 555. pl. 504. Pasch. 1706. *Lady Herne & al. v. Herne & al'.*

30. A child intitled by his father's marriage articles to an equal share of one third of his father's personal estate has a legacy given him by his father's will; if he will have the benefit of the will he must renounce the articles. Per Cowper C. 2 Vern. 556. *Lady Herne & al' v. Frederick Herne & al'.*

31. Devise to a creditor of more or less than is due to him, is to be construed as a gift or gratuity, and not a payment of the debt only, where there are affets and proof of kindness. 1 Salk. 155. pl. 5. Mich. 6 Ann. Per Cowper C. *Cuthbert v. Peacock.*

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2 Vern.
593. S. C.
decreed
upon cir-
cumstances
and parol

proof. — S. C. cited by the Master of the Rolls. 3 Wms's Rep. 227. — F. was indebted 50 l. to C. and left him a legacy of 500 l. and made him executor, and after the making of her will borrowed 150 l. more of him, and died. The Master of the Rolls decreed that this legacy should be a satisfaction of both the debts, that contracted after the will, as well as that contracted before; but Harcourt Ld. Ch. reversed the decree, because a court of equity ought not to hinder a man from disposing of his own as he pleases; and when he says he gives a legacy, we cannot contradict him, and say he pays a debt; and as to the debt contracted afterwards, he said there was no pretence to make this to be a payment of that. If a legacy be less than the debt, it was never held to go in satisfaction; so if the thing given was of a different nature, as land, it should not go in satisfaction of money; so if the legacy be upon condition, for by the breach he may be a loser, whereas the will intitled it for his benefit. Note, in all these cases the intention of the party ought to be the rule. 2 Salk. 508. *Cranmer's case.* — S. C. cited by the Master of the Rolls, 3 Wms's Rep. 227. as decreed by Ld. Harcourt, that a legacy though it exceeded the debt, could not be intended as a satisfaction thereof; and that indeed it may be presumed, that if the testator intended to pay or satisfy a debt, he would certainly have taken notice of it.

* S. P. per Master of the Rolls. 2 Wms's Rep. (616.) Trin. 1731. *Eastwood v. Winke or Styles.* — If the sum given be as great or † greater than the debt, it is a satisfaction of the debt. But if given on a † contingency it is no satisfaction. Per Master of the Rolls Ch. Prec. 394. Mich. 1714. *Sir John Talbot, alias Ivory v. D. of Shrewsbury.* — Arg. G. Equ. Rep. 64.

† S. P. per Cowper Ch. G. Equ. R. 66. in case of *Davison v. Goddard.* — 500 l. bequeathed to a creditor for 300 l. who was also made executor, and submitted to account for the surplus, was decreed per Parker C. not to go in satisfaction of the 300 l. 10 Mod. 400. Pasch. 10 Geo. in Canc. v. Mortimer Powell.

‡ Abr. Equ. Cases 205. *Crompton v. Sale.* S. P.

32. A. agreed with B. to give B. 2000 l. portion to be laid out by A. he purchases lands with 1000 l. and mortgages them, and then settles pursuant to the articles, excepting only in one limitation. A. devised those lands to his wife for life, and also a legacy in money, and

and gave legacies to B. and his children, and dies without issue of his body, leaving the children of B. his heirs at law. Per Cowper C. The lands settled according to the articles was a good performance so far as the value was over and above the mortgage. Then it was urged that the legacy to the children was a bounty, and not a satisfaction of the demand of the heir; because at the time of the legacy it was not known whether he would be heir, or take any thing by the settlement, and also it was a legacy given to him in company with others, and the dispute is not between the executor defendant and a creditor, but between the executor and B. and his son and daughters; and there are assets enough to answer every thing. Yet it was directed that the master enquire what assets by descent in fee, and other personal estate came into his hands, and that to be as part of the satisfaction of his demand. G. Equ. Rep. 64. Pasch. 6 Ann. Letchmere v. Blagrave.

33. A. received 1000 l. to the use of B. and makes B. executor and dies, that shall go in satisfaction. Per Ld. Cowper. G. Equ. R. 64. Pasch. 6 Anon. in S. C.

[364] 34. A. on his marriage settled lands by which he was tenant in tail, and covenanted not to suffer a common recovery, but that the lands should be enjoyed according to the limitations. But afterwards suffered a recovery to the use of himself and heirs. He had only one child, a daughter, to whom he gave a considerable portion on her marriage, and after devised the said lands in trust for his said daughter for life, with remainder to her first, &c. son in tail male, and if she survived her husband, then to her in fee, but if she died first then the remainder over, and died. The husband and daughter bring a bill for a specific performance of the covenant. The Lord Chancellor being of opinion that the covenant did not bind the land, the plaintiffs pressed that they might be at liberty to sue the executor, and recover out of the personal assets, and in order thereto that an issue might be directed, upon which the court directed that issue to be, not what the husband, but what the wife, was damnified by the breach of this covenant. Though he said that surely the plaintiffs come too soon; for the wife may survive, and the whole being limited to her, if she survives she may perhaps be no way damnified, and that the testator having given her a portion, the defendant shall have liberty to give in evidence anything which may tend to a satisfaction of this breach of covenant. Wms's Rep. 104. to 108. Hill. 1708. Collins v. Plummer.

35. A. devises 10 l. per ann. to B. for life charged on houses held by a lease for years, and made M. his wife sole executrix. M. by will devised 10 l. per ann. to B. for life, and made J. S. executor, and J. S. settled lands of his own, and charged them with payment of 20 l. per ann. to B. for life. Ld. Cowper thought the two 10 l. annuities given by the several wills were several devises of two several 10 l. But whether the 20 l. by the settlement of J. S. should be additional or only in satisfaction was not decreed, though it was sworn by two persons to be intended in satisfaction. See G. Equ. R. 66. Pasch. 7 Ann. Davison v. Goddard.

36. A.

36. A. had two daughters M. and N. A legacy of 100l. was left to M. by J. S. and another of 50l. by W. R. and *both legacies were in the father's hands as executor of J. S. and W. R. afterwards A. by will by virtue of a power charges his lands with 2000l. and also left M. and H. 250l. a-piece.* This is not a satisfaction of the two legacies to M. Ch. Prec. 314. P. 1711. Meredith v. Wynni.

37. *A father gives legacies to his children by his will, and makes his wife executrix. She not having paid the legacies, gives them legacies likewise. One of which was the same sum, and the other a greater.* Decreed they shall not have both, and the latter is a satisfaction of the former. And where there was a devise of the lands, with which one of the first legacies was chargeable it was decreed that this was a devise of the money, which is payable out of the lands. 1712. in Canc. Barkham & Ux. v. Dorwine.

38. *The wife of a freeman shall not take by her husband's will, and by the custom too any part of the husband's personal chattles, unless it be expressly declared in the will. But otherwise of chattles real, given to her for her life, or freehold.* Ch. Prec. 351. pl. 257. Mich. 1712. Kitson v. Kitson.

39. *A. covenants to leave his wife worth 650l. he dies intestate, and her share on the statute of distribution comes to 1000l. This is a satisfaction.* Per Master of the Rolls. 2 Vern. 709. pl. 631. Hill. 1715. Blandy v. Widmore.

S. C. was affirmed by Lord C. Cowper. Trin. 1715. Wms's Rep. 324

40. *By marriage articles the wife's portion of 700l. and 700l. of the husband's was to be laid out in land, and settled to them and their issue, remainder to the heirs of the husband, who afterwards dies without issue; and by his will gave her all his personal estate, which was of greater value than 1400l. and devised his lands to J. S. Ld. Harcourt, and now affirmed per Ld. Cowper, decreed the 1400l. to J. S. as land, and that the bequest of the personal estate to the wife was a satisfaction.* Ch. Prec. 400. Pasch. 1715. Linguen v. Souray.

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41. *In case of a legacy to a creditor the nature and circumstances of the debt are material, as if it was upon an open and running account betwixt the testator and his executor, so that it might not be known to testator whether he owed any money or not to the executor, then the testator could not intend the legacy to be in satisfaction of a debt which he knew not that he owed, any more than a legacy can be a satisfaction of a debt contracted after the making the will; per Ld. Cowper.* And referred it to a Master to state how this debt arose, with all the circumstances of it. And in Easter term 1718. the cause coming upon the master's special report, Ld. C. Parker said, that he was inclined to help the defendant, who by mistake or misadvice only of his counsel was in a way of losing his right, (as to the surplus of the testator's estate which by mistake he had waved in his answer, and so could not now be decreed for him) and therefore if the plaintiffs would bind the defendant by his

answer from taking the surplus as executor, they ought to take it upon the terms in the answer, viz. the executor *waves the surplus but insists upon his debt and legacy*, and he decreed him in this case, both debt and legacy, even though it appeared by the master's report, that the *legacy was much greater than the debt*. Wms's Rep. 298. to 300. Mich. 1715. 1718. Rawlins v. Powell.

42. A. devised 1200l. among the children of B. viz. D. E. F. and G. to be distributed at the discretion of B. but not to be compelled to pay till 12 Months after A's decease. D. died before A. and E. died within six months after A. Several years after A's death B. paid 900l. to F. who gave B. a receipt in full of his share. B. by will gave 400l. to G. in full of her share of the 1200l. G. demanded the residue of the 1200l. with interest from the end of a year after A's death. Cowper Ch. held that the remainder to F. and his receipt for 900l. barred him and his representative from any further claim, and that the remainder belonged to G. and ordered that B. should allow interest at 5l. per cent. for the whole 1200l. from a year after testator's death, and that the 900l. paid to F. should be taken out of so much principal, as with the interest of it would make up 900l. at the time it was paid to F. and then to carry interest for the remaining principal from the end of the year after A's death, and decreed such *principal with interest* to be paid to G. 2 Vern. 744. pl. 652. Hill. 1716. Bird v. Lockey.

This was so decreed by the Master of the Rolls. Hill. 1717. Wms's Rep. 408. 409. Chan- cey's case.

But this decree was afterwards reversed per Ld. Ch.

Kings, upon the particular circumstances varying it from the common case, viz. that the will by express words devised that *all his debts and legacies should be paid*, and that the 100l. bond being a debt, and the 500l. a legacy, it was as strong as if he had directed both bond and legacy to be paid. And so the servant had both debt and legacy. Wms's Rep. 410. Trin. 1725. Chancey's case.

[366] 44. *Pecuniary legacies and annuities given by a codicil, though of greater value than given by the will to the same persons shall not be taken to be a satisfaction for the pecuniary legacies given by the will, because the annuities are not ejusdem generis, and the annuitants might die the next day after the testatrix, and so the latter gifts, instead of a bounty might be a prejudice, if construed in satisfaction of the legacies by the will, and shall not be so taken unless so expressed. And the codicil is part of the will, and proved as part thereof, and it is as if both the legacies had been given by the same will; and it seemed a circumstance tending to prove that the testatrix intended*

intended additional bounties, for that between the making the will and codicil, an additional estate came to her from her mother; per the Master of the Rolls. Wms's Rep. 421. 423. &c. Pasch. 1718. Masters v. Harcourt Masters.

45. J. Lemon devised lands to his wife for her life, and devised other lands to the plaintiff his brother and his heirs. The defendant, wife of the testator, enters into the lands devised to her, which were of more value than her dower, but not devised to her expressly in lieu and satisfaction of dower, and afterwards brings dower against the devisee of the other lands, and recovers dower against him with costs, who brings his bill in this court to be relieved against the judgment, the lands devised to her by her husband being of greater value, and she in possession of them.

The case of LAWRENCE and LAWRENCE in Dom. Proc. was cited for the defendant as a case in point that the wife shall have dower, notwithstanding a devise to her for life of lands by her husband, unless declared to be in lieu and satisfaction of dower.

Parker C. said, this point is determined already by the House of Lords that there is no relief in this case in equity, therefore the bill must be dismissed. MS. Rep. Trin. 5 Geo. Canc. Lemon v. Lemon.

46. Mrs. Tryan having three daughters A. B. and C. by her will bequeathed to A. 1000*l.* to B. 800*l.* to C. 500*l.* at age or marriage. Afterwards on treaty of marriage of A. with the plaintiff, she approving the match, gave P. a note to pay him 500*l.* in six months, if the marriage took effect, in augmentation of her fortune. The marriage took effect; the mother fell sick on the day of marriage, and died six days after. The executors insist that the 500*l.* on note was given in satisfaction of the 1000*l.* legacy, or at least of so much of it as the note was given for. (N. B. *These daughters had portions of 1500*l.* by the father's will.*) The defendants insisted that the mother after giving the note declared, that she only intended to give her daughter A. 1000*l.* and was uneasy during her sickness that her will was not altered, and gave directions for that purpose, but died without altering the will, and they made proof thereof, and insisted that the words (in augmentation of her portion) was to be applied to the portion left her by her father. Also that the mother's assets would not satisfy all the legacies in the will, if this note should be paid. Objection, that the will gives a legacy of 1000*l.* and the evidence is to controul it, it is not to prove any thing consistent with the will, or to explain it, as where two are of a name where a legacy is given, and afterwards the testator becomes indebted to the legatee, that cannot be supposed to be given in satisfaction of the debt, which was not then contracted. But in regard the proper question was, whether the mother hath not, by giving a note, advanced part of the 1000*l.* in her life-time, with intent to make the 500*l.* irrecoverable, so the evidence was to explain, but bare declarations of a testator shall not be given in evidence, for that would be to make a will in writing alterable by parol. The testator died

before she had altered her will or finished it, but no witnesses going* to the value, Ld. Chancellor sent it for a master to state the value, and reserved the farther direction. The 500l. had been paid, and the defendants agreed to let the plaintiff have another 500l. admitting the 1000l. to be due in all events. Hill. 6 Geo. Canc. *Pepper v. Weyneve*.

47. If a man gives a legacy to a creditor *to the amount of his debt*, this has been construed a payment or satisfaction of the debt, because a man must be supposed to be just before he is bountiful. But there can be no pretence to say that because a testator gave a legacy of 500l. to his debtor, therefore this was an argument or evidence that the testator intended to remit him the former debt. Per the Master of the Rolls. 2 Wms's Rep. 128. 132. Pasch. 1723. *Jeffs v. Wood, & al'*.

48. A. made his will and gave 100l. legacy to his executor, and afterwards contracted a debt of 25l. with the executor (who was an attorney) for fees and business done. Ld. C. King resolved without difficulty, that this debt being contracted subsequent to the will, the legacy could be no satisfaction for the same. 2 Wms's Rep. 343. Hill. 1725. *Thomas v. Bennet*.

Wms's Rep. 408. *Chancery's case*
S. C. decreed accordingly,
and the court said they were not by this resolution over-turning the general rule; "but that this case was attended with particular circumstances varying it from the common case, viz. that the testator, by the express words of the will, had devised, "That all his debts and legacies should be paid," and this 100l. bond being then a debt, and the 500l. being a legacy, it was as strong as if he had directed that both the bond and legacy should be paid; that when the testator gave a bond for the 100l. arrear of wages, it was the same thing as paying it, and as if he had actually paid it, and had afterwards given the legacy of 500l. the executor could not have fetched back the 100l. and made the defendant refund, so neither should the bond in this case be satisfied by the bequest of the legacy. His lordship also observed, that the executor (the plaintiff Mr. Chancery) did not himself take this 500l. legacy to be a satisfaction for the bond, as appeared by his having voluntarily paid the 100l. to the defendant, and that his lordship was of the same opinion. So the decree at the Rolls was reversed, and the defendant (the maid servant) had both her debt and legacy.

49. A man indebted by bond to his servant, gives her 500l. for her long and faithful service, though the legacy is more than the bond, yet she shall have both. Sel. Cases in Chan. in Ld. King's time. 44. Trin. 11 Geo. *Chancy v. Wotton*.

2 Wms's
Rep. 553.
S. C.

50. A. had six sisters B. C. D. E. F. and H. and devised to B. C. and D. annuities for lives of 10l. each, and to E. F. and H. annuities of 5l. each to be paid out of his personal estate, and gave all the rest of his real and personal estate to M. his wife, whom he made sole executrix. Afterwards M. by will gave two annuities of 5l. each to E. and F. and their heirs in case they happen to over-live B; and also another annuity of 10l. to H. and her heirs; and another of 5l. to D. and her heirs; but takes no notice of A's will, or that B. D. E. F. and H. had any annuities given them thereby. It was urged that these annuities being charged on the personal estate, and M. made executrix, she was as a debtor for them, and so the legacy by M. a satisfaction of the annuities given by A. to the same persons. But per Ld. Chancellor that point has been carried too far, and he would carry it no farther, especially there being *assets*, to answer both, and there can be no pretence to say that the two first annuities

ities of 5l. each can be a satisfaction of the like annuities given by the husband, because they are given upon the *contingency of over-living* such a one, which has *not yet happened*, and possibly never may; and then shall the annuities for life, which are certain, be extinguished, by giving the same persons annuities in fee on a contingency which may never happen; and if that be so, as to these annuities there is no reason to imagine the wife had a different intention as to the others, or that she intended two of them should go in satisfaction of the like annuities given by her husband, and the other two not; and the cases where a legacy has been held to be a satisfaction of a debt are where the debt was *owing by the same who gave the legacy*; but if such legacy be given upon a contingency, or to take place at a future day, it is no satisfaction of the debt; and therefore it was decreed, that the annuities given by the wife were distinct additional annuities, and not an enlargement only of the husband's annuities, from an interest for life to an interest in fee, as it was urged to be, and therefore should go in satisfaction of those annuities; which the court held they should not, but that the annuitants should take both. Abr. Equ. Cases 205. Trin. 1729. Crompton v. Sale.

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51. The Master of the Rolls said, he looked upon it *as a stretch* that where a man has owed J. S. 100l. and after gave him a legacy of 100l. this latter has been taken in satisfaction of the former *since at that rate nothing is given*. But though the court has gone so far, *it never construed a devise of land to be a satisfaction for a debt of money*, much less has it decreed that a legacy of a *less sum than the debt* should be deemed a satisfaction *pro tanto*. 2 Wms's Rep. (616) (617) pl. 191. Trin. 1731. in case of Eastwood v. Vinke or Styles.

52. 30,000l. is covenanted to be laid out in land, the money need not be laid out all together upon one purchase, but if laid out at several times it is sufficient; and if the covenantor dies, having purchased some lands which are left to descend this will be a satisfaction *pro tanto*. Per Ld. Talbot. 3 Wms's Rep. 228. Mich. 1733. Lechmere v. Carlisle (Earl of).

53. Husband on marriage settled 100l. per ann. pin-money in trust for his wife for her separate use which becomes in arrear, and then the husband by will gives the wife a legacy of 500l. after which there is a further arrear of the pin-money, and then the husband dies; this legacy being greater than the debt, decreed even in the case of the wife to be a satisfaction of the arrears of pin-money due before the making of the will. 3 Wms's Rep. 353. Pasch. 1735. Fowler v. Fowler.

54. One having by his will given his wife 600l. in money on his death-bed, ordered his servant to deliver to his wife then present two bank notes payable to bearer, amounting to 600l. saying he had not done enough for his wife; this gift is additional, and shall not be construed a payment of the former legacy in the testator's life-time, 3 Wms's Rep. 356. Trin. 1735. Miller v. Miller.

(U. c) Immediate Devise What is.

In respect of the Incapacity of the first Devisee.

1. IF a man *devises to one for life, the remainder to another in fee,* and dies, and the *tenant for life waves the devise,* then he in remainder may enter immediately. Br. Waiver de choses, pl. 1. cites 3 H. 6. 46.

2. Where a devise is *to a monk, remainder to B.* In this case B. shall take immediately, because devise to a monk is void; but if it were that *after the death of the monk it should remain,* B. should not take till after the monk's death; per Powell J. 12 Mod. 285. cites 9 H. 6. pl. 34-39. f. 16.

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3. The father devised his *goods to his son, when he should be of the age of 21 years, and if he die before that time, then his daughter should have them; the son died under age.* Adjudged that the daughter should have the goods immediately, and not stay till the time her brother would have been of age, if he had lived. And. 33. pl. 82. cites Mich. 4. E. 6. Anon.

4. Baron and feme *jointenants for life, remainder in fee to the baron;* the baron devised a *rent of 4l. out of the manor to a son with clause of distress for his child's part to be paid yearly.* The baron died; and 19 years afterwards the wife died. The court agreed that in case of a grant by a reversioner after a lease for life of a rent-charge after the death of the grantor, that the grantee shall distress for all the arrearages incurred after the grant, even during the life of the grantor, and it was urged by counsel this was stronger, for this rent, as it appears by the words, was devised to the avowant (for his livelihood) and (for his children's part) which words imply a present advancement; and these words yearly (to be paid) are strong to that intent. It was adjourned. Le. 13. pl. 16. Mich. 25 and 26 Eliz. B. R. *Rearfby v. Rearfby.*

5. *Remainder-man in fee* on an estate for life devised it to his wife yielding and paying during her natural life 20s. and dies, living the tenant for life; the rent shall not begin till the remainder falls so as the general words refer to the beginning of the estate, though the words imply that the rent shall be paid presently. Arg. Le. 243. pl. 330. Pasch. 33 Eliz. B. R. in case of Lord Mordant v. Vaux.

6. A. devised lands unto M. his wife until B. his daughter should be 21, and then to M. and B. for their lives. Per Anderson, Beaumont and Walmley, this shall enure as an immediate devise, and the term is extinct in the freehold, and they are jointenants in the freehold. Cro. E. 532. pl. 66. Mich. 38 and 39 Eliz. in Scacc. Block v. Pagrave.

7. A devise to his wife till his son shall be of the age of 24 years, then to the son in fee, and if he die before 24 years without issue, then

to the wife for life, remainder to A. &c. The testator died. It was adjudged that the son had a fee simple presently. For an estate tail he could not have till he was 24 years old; and after the death of his father there was no particular estate to support that estate in the remainder till he should come to the age of 24 years, so that he took by descent immediately. Arg. 2 Mod. 291. cited as adjudged about 17 or 18 Car. 2. in case of Taylor v. Wharton.

8. A. possessed of a term purchases the inheritance of the same lands in the names of others in trust for himself and his heirs, makes his will in writing, and devised to B. *all his estate in the said term; and my will is, that my executors and trustees shall so convey my estate to B. that the same may remain to him and the heirs male of his body.* This is no present devise of the term, and so not forfeited for a felony done by B. Sid. 403. pl. 20 & 21 Car. 2. B. R. Sir G. Sand's case.

9. If a devise be of land to A. and his heirs within four years, it is a present devise, per serjeant Pemberton; Arg. 2. Mod. 286. Hill. 29 & 30 Car. 2. C. B. in case of Britain v. Charnock.

10. Devise to A. (his heir at law) till B. be of age, and then to B. in fee. Testator died. B. died within age, yet a fee vested in B. presently. 2 Mod. 289. Hill. 29 & 30 Car. 2. C. B. Taylor v. Biddal.

Held that the heir should have the fee in the interim.
1 Le. 101.

Gates v. Halywell.

11. M. seized in fee, gives his lands after his death without issue male to H. in tail male until he or they make any acts to alter or discontinue this estate tail, and then to T. and the heirs male of his body, with several remainders over. The deviser dies without issue, H. enters, T. dies leaving R. H. levies a fine. R. enters. It was objected that R. could not enter, because the remainder devised to his father was contingent, viz. to arise upon H's alteration of the estate, and not before, and then T. dying before the contingent happened, the remainder could not vest; but resolved the remainder to T. was not contingent, but an immediate devise; because should it be contingent the deviser's intent would be destroyed, which was, that every one in remainder successively should enjoy the land. Raym. 429, 430. Hill. 32 & 33 Car. 2. B. R. cites 2 Cro. 696. & Jones 56. Foy v. Hinde.

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12. Devise of lands to B. in tail after debts paid, is as a present devise; for whenever the debts shall be paid it will be the same thing as if no such debts had been. Wms's Rep. 144. Arg. and admitted per Lord Harcourt. And. Ibid. 145. Pasch. 1711. in case of Bale v. Coleman.

13. Lands were devised to his wife for life, till his son and heir apparent should attain 21. and when he should be 21. then to his son and his heirs. Harcourt C. held, that the remainder vested presently in the son upon the testator's death, and was not to expect till the contingency of attaining of his age of 21 years should happen, for then he dying before that age it would never have vested. Abr. Equ. cases 195. Hill. 1713. Manfield v. Dugard.

F f 4.

14. A.

The trust of the term was declared to be to pay A's debts and legacies (which were considerable) and 50 L. annuity to B. for life, and to give power to C. to charge the premises with 1000l. a-piece for

14. A. has two sons, B. the eldest, C. the youngest. A. devised lands to trustees, and their heirs and executors for 500 years upon such trust as by will should be declared, and after the term ended then to the use of the eldest son of B. to be begotten, and the heirs males of his body, and for default of such issue to the use of C. and the heirs male of his body. A. died. B. had no issue at A's death. Upon a reference to the judges they certified that B. should take immediately; 1. Because the son of B. (not yet born) cannot take by way of remainder, there being no particular estate to support it. Nor, 2dly, Can he take by way of executory devise; so that if the fee simple should descend to the heir at law and vest in him till the contingency happened, it would tend to a perpetuity; afterwards the parties agreed. 9 Mod. 4 Trin. 8 Geo. Gore v. Gore.

his younger children, payable at 21, and maintenance in the mean time, and the trustees to raise the same out of the said term, and then the term to attend the inheritance. 2 Wms's Rep. 28. —It was argued that the charges were so great, and the performance of some so distant in all likelihood, that in a court of law it ought to be looked upon as an absolute term for the whole 500 years. 2 Wms's Rep. 38, 39. And the judges certificate and reason why it could not take effect as an executory devise was, because it was too remote, viz. after 500 years. But Lord Maclellan was dissatisfied with this opinion of the judges, and said that this being but a trust-term and to be considered in equity as a security only for money, it ought not to make the devise over void. Afterwards B. had a son and died, and the son of B. bringing this matter again into chancery in Ld. King's time, his lordship sent it a second time into B. R. when the judges there being all new judges gave their opinion contrary to their predecessors, viz. that it was a good executory devise, and not too remote; for that it must one way or other happen on the death of B. whether he should have a son or not, and that either upon the birth of the son, or upon his death without issue male, the freehold must vest. Trin. 1722. 2 Wms's Rep. 640. Gore v. Gore. —And the reporter says that Lord Raymond also was of the same opinion. Ibid.

And afterwards C. died without issue, whereupon D. a next remainder-man bringing this matter yet once more into chancery in Ld. C. Talbot's time, his lordship referred this matter again to the judges of B. R. who certified that they thought the remainder good, and that an interim estate till the birth of the son of B. (and who is since born) descended to B. and so the contingent remainder supported. (Ut audiui.)

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(W. c) What is a Lapsed Devise.

2 Brownl. 247. Per Fleming Ch. J. S. P. —Per Coke Ch. J.

1. **D**EVISE to a monk for life, remainder to a man capable. The remainder is good in present possession, yet the particular estate is void a principio. Arg. Mod. 519. cites 9 H. 6. fo. 24.

2 Bullst. 292. S. C. cited, and Perk. f. 568. and Pl. C. 35. in Colthirst's case. —It is not good as a remainder but as a new devise; per Clench. Ow. 112. —Nothing passes to the remainder-man till the death of the monk. Arg. 10 Mod. 120. cites Le. 195. [But that is, that the devisee in remainder shall take the land presently.]

Ibid. Marg. cites S. P. adjudged accordingly. Mich. 37 & 38 Eliz.

2. Devise of lands to A. for life, remainder to B. in fee; devisee for life dies in life of devisor; he in remainder may enter and execute his remainder. D. 122. a. pl. 20. Mich. 2 & 3 Ph. & M. cites Perk. [S. 506.]

Fuller's case. —Cro. E. 422. pl. 20. S. C. & S. P. accordingly. —S. C. cited per Cur. 2 Vern. 723. Mich. 1716. —2 Vern. 468. Arg. cites Plowd. C. 245. a. in Brett v. Rigden's case. —Cart. 4 S. P. in case of Davis v. Kemp. —8 Mod. 126. S. P. per Cur. in case of Goodright v. Opy, cites Perk. 108. b. 109 a. —2 Brownl. 247. S. P. —Devise to A. in tail,

tail, remainder to B. in tail. *A. disagees*, B. shall take; per Harper J. Pl. C. 414.—But if the devise be to A. for life, and there is no such person as A. there the devise is void; per Harper J. Pl. C. 414.

3. The testator had two sons and one daughter, and being seized in fee he devised his lands to his wife for ten years after his decease, remainder to his youngest son and his heirs, and if any of his two sons died without issue, remainder to his daughter and her heirs. The youngest son died without issue in the life-time of his father, and then the father died without altering his will. All the court held that this was a good remainder to the daughter, notwithstanding the death of the devisee without issue in life of the testator, and would not argue the case. Dyer 122. a. pl. 20. Mich. 2 & 3 P. & M. Rickman v. Gardiner.

4. A devise to A. N. the dean of Pauls, and the Chapter there and their successors, and A. N. dies and J. S. is made dean, and after the devisor dies; the new dean shall take, though not by the words, yet according to the intent; for the chief intent was to convey it to the dean and chapter and their successors for ever, and the singular person of A. N. was not the principal cause though perhaps it was one of the causes; per Manwood. Pl. C. 344. b. ad finem. Trin. 10 Eliz. in case of Brett v. Rigden.

5. A. devised lands to his wife for life, and afterwards to B. his son and heir, and if she die before the son's age of 24, then J. S. to have the land till the son is 24. A. died. J. S. died living the wife, the son being under 24 years. Per Anderfon and Periam J. the executors of J. S. shall not have the land till the son's age, but Rhodes and Windham J. doubted. 3 Le. 195. pl. 244. Hill. 24 Eliz. C. B. Anon.

6. Devise may be to the use of another; then when *cesty que use dies in the life of devisor* devisee shall take it, and when a son is born it shall go to him (the devise being to *cesty que use* and the heirs male of his body.) But if the *use be void*, then devisee shall have it to his own use, Arg. But by Wray and Anderfon the devise is void, and it is all one with Bret and Rigden's case; and by Anderfon, if a man devise land to the use of one, which use by possibility is good, and by possibility is not good, if afterwards, *cesty que use* cannot take, the * devise shall be to the use of devisor and his heirs. Le. 254. pl. 363. Trin. 33 Eliz. B. R. Ellis Har-
top's case.

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Cro. E. 243. S. C. adjudged that the heir of the devisor shall take.—2 Vern. 723. Arg. S. C. cited.—Ch. Prec. 440. in case of

Sympton v. Hornsby.

7. A. had four sons, and devised to the youngest in tail male, with remainder successively to the other three; the youngest dies in the life of devisor having issue male, if the issue shall take, quære? Court divided two against two. Mo. 353. pl. 476. Hill. 36 Eliz. B. R. Fuller v. Fuller.

Adjudged that the issue shall not take but the next in remainder

shall enter presently. Cro. E. 423. pl. 20. Mich. 37 & 38 Eliz. B. R. the S. C.—2 Vern. 722. Mich. 1716. Decreed that the issue shall not take. Hutton v. Simpson.—Ch. Prec. 440. Sympton v. Hornsby S. C. & P.—G. Equ. R. 115. S. C.

Devise to A. in tail, remainder to B. and the issue of her body lawfully begotten, remainder to the right heirs of A. for ever. A. died without issue living the testator. H. after making his will had issue C. who was also heir at law to A. and dies living the testator; resolved that the

the heir at law of the testator and not C. shall have the lands. 10 Mod. 369. Woodright v. Wright.——Wms's Rep. 397. Hill. 1717. Goodright v. Wright. S. C.

But B. dying after the devise and living the testator it shall go to C. in remainder. 8. Devise to B. and the heirs of his body, remainder to C. and the heirs of his body. Per. Popham Ch. J. none will doubt if B. had been dead at the time of the devise, but that the heir should take it as a purchaser. Cro. E. 423. pl. 20. Mich. 37 & 38 Eliz. B. R. in case of Fuller v. Fuller.

Adjudged Cro. E. 423. in the case above.——8 Mod. 224. Arg. cites Cro. E. 423.——4 Mod. 283. in case of Reeve v. Long cites S. C. Arg. says that it being in the case of a son it was not the intention of the father to disinherit him, but (it is said in margin) that if the devise had been to a stranger, then to make the issue of B. take, there must have been a new publication of the will.——B. died in the life of testator leaving issue, yet C. shall take and not the issue of B. and the words heirs or heirs males of his body denote only the quantity of the estate, per Cowper C. but said that the construction of law in those cases was extremely rigid and severe, and that the testator's meaning was, that C. should not take while there was any issue-male, or issue of B. but since it was not *res integra*, he was bound by the former resolutions as it was a point of law, but since it was so and by that means an heir at law disinherited as to a moiety he would decree no account of the rents and profits there being no infant and left them to law. Ch. Prec. 439. 452. Pasch. 1716. Simpson v. Hornsby.——Gilb. Equ. Rep. 120. S. C. in totidem verbis.

Because heirs here is a word of limitation 9. Devise of lands to A. and his heirs. *A. dies before the devisor.* Devise is void. 1 Rep. 155. b. Mich. 40 & 41 Eliz. B. R. in the Rector of Chedington's case.

Jenk 124. pl. 50.——Jo. 59.——Pl. Com. 345. a. Brett v. Rigden.——Cited 2 Vern. 468.——2 Vern. 722. Hutton v. Simpson. S. P.——Simpson v. Hornsby. Ch. Prec. 440. S. P. and cites Bret v. Rigden, and that the words *heirs* or *heirs of the body*, &c. are only to express the quality of the estate, as to give a fee by the word (*heirs*) or a tail by the words (*heirs male of the body*, &c.) But that they are not in either case any description or designation of the person, who was to take by purchase.

* For by the will the heir was intended to take by descent, but if the lands pass he must now take by purchase, per Trevor Ch. J. 11. Mod. 156. in delivering the judgment of the court in the case of Archer v. Bokenham.——In this case there was no compleat devise, because the ancestor to whom the devise was made dying in the life-time of the devisor, there was no devise at the time she will was to take effect; per Jekyl Master of the Rolls. 10 Mod. 421. Mich. 5 Geo. 1. in case of Marks v. Marks.

Mo. 831. pl. 1118. Price v. Almorey S. C. agreed accordingly. 10. In case of a lease for years devised to A. and after the death of A. to B. Adjudged that B. dying before A. the executors of B. could not take, for that it was only a contingency and no interest. 1 Bulst. 191. Pasch. 10 Jac. Price v. Atmore.

——4 Le. 246. pl. 401. S. C. agreed that the executor of the son could not enter.

[373] 11. Devise of lands in fee to A. for life, then to B. the son of A. and for default of heirs of B. to his own right heirs for ever; and the testator devised a mortgaged term in possession to A. to do with it for the only use of B. as he pleased, and that B. should enjoy the same at his age of twenty-one years; and not before; and if he died before, then he devised all that he had bequeathed to B. to C. D. and E. equally to be divided. D. died after the testator (but in the life-time of B. the first devisee, and before the contingency happened; decreed that the executors of D. are wholly excluded of any benefit of the devise either of the mortgaged term or the lands in fee. Fin. Rep. 217. Trin. 27 Car. 2. Edwards v. Allen.

12. Devise to his sister, who was his heir at law, for years, till her son by a second husband comes to twenty-one, then to him

him in fee. He died within age. Yet a fee vested in him presently. 2 Mod. 289. Hill. 29 & 30 Car. 2. C. B. Taylor v. Biddal.

13. If lands be devised to *A. and his heirs*, and *A. dies before the testator*, it was agreed by all that his *heirs shall take nothing*; for heirs is a word of limitation and not of purchase; agreed per tot. Cur. Freem. Rep. 290. in pl. 343. in C. B. in case of Steede v. Berrier. Vent. 342.
Trin. 31
Car. 2. B. R.
the S. C.
but not S. P.

14. A. devised to *B. and C. and their heirs. B. dies before A. C. shall have the whole by survivorship*. Per Holt. Ch. J. and not denied by any of the court. Show. 91. Hill. 1 W. & M. in case of Edlestone v. Speke. S. C. cited
8 Mod. 224
in case of
Wright v.
Horne.
Cart. 4. S. P.

Davis v. Kemp. — 1 Salk. 238. S. P. in case of Bunter v. Coke. — S. P. by Holt Ch. J. Gibb. 231. cites it as held in Ld. Bridgman's time in Davis's case. — It is good without any new publication; but if both had died the heirs could not have taken.

15. A man possessed of a term devised it to *an infant in ventre sa mere, provided it be a son; and if the child be a son, and die in its minority, then to the defendant*; the executor assented, but the child being a daughter, it was adjudged upon a special verdict, that the defendant cannot take, because here is a condition precedent, which never happened, and the executor's assent is not material, where there is no devise. Comb. 437, 438. Trin. 9 W. 3. B. R. Estcourt v. Warry.

16. A. devised *two farms to his father and mother for life, remainder to trustees till A. and B. respectively come to age, then to convey one farm to A. and the other to B.* A. died, living the father, before the time came for the conveyance to be made, yet per Cur. as he was to have had an estate in fee, he being dead, the conveyance shall be to his heir. 2 Vern. 561. pl. 510. Trin. 1706. Hook v. Taylor.

17. By the civil law it is a rule laid down in Swinburne, that when a legacy is payable *at a time uncertain, as at the death of testator's wife*, that if legatee be then dead, it is not to be transmitted to the executor, but is a lapsed legacy. Cited per Ld. Chanc. 2 Vern. 760. Trin. 1718. in case of Pinbury v. Elkin. But decreed
contra in
the S. C.
767. and
2 Vent.
347. Anon.
— Ld. C.

Parker said, that it was true in Swinburne, 461, 462, &c. some cases were put which seemed to import that the possibility would not go to the executor of the legatee; but that those cases were so darkly put, and with so many inconsistencies as to be all overbalanced by the opinion of Ld. Nottingham in 2 Vent. 347. where A. devised 100 l. to B. at his age of twenty-one and if B. died under age, then to C. afterwards C. died living B. and then B. died under age, and Ld. Nottingham decreed that the executors of C. should have the 100 l. Trin., 31 Car. 2. Anon.

18. Devise of lands to *S. and the heirs of his body. S. died in the life-time of the devisor*; it is in the nature of a lapsed legacy and the heir of S. shall take nothing. MS. Tab. March 9th, 1725. Wynne v. Wynne.

19. A. devises to *B. and C. and the survivor and survivors of them his heirs and assigns equally* to be divided between them, share and share alike. B. died in the life of A. Decreed per King C. the whole estate to C. for life as jointenant, and after one moiety to C. and his heirs and the other moiety to the heir at law of A. (after the [374]
S. C. 2.
Wms's Rep.
210. Trin.
1725. But
says nothing
the

of the word (survivor) being surplusage.— See jointenants (K) by name of Barker v. Giles.

the death of C.) and his heirs; for that it was a jointenancy for life, and a tenancy in common of the inheritance, and that the word *survivors* was *surplusage*. 9 Mod. 159. Trin. 11 Geo. Baker v. Eyles and Smith.

See jointenants (K) by name of Barker v. Giles.

(X. c) Lapsed Legacy.

1. **I** F executor legatee refuses to prove the will by the common law (though otherwise by the civil law) he hath no remedy for his legacy. For by the refusal there is a dying intestate and then nothing could be devised. Owen 44. 31 Eliz. Catlin's case.

2. Lands devised to be sold for payment of portions; one of the children dies after the portion due and before the land sold; the administrator of the child is intitled to the money. Vern. 276. pl. 276. Mich. 1684. Bartholomew v. Meredith.

3. D. devises to his sister M. 500*l.* she at the death of the testator was a probationer at the convent of Benedictines at Brussels, and became a professed nun, and then she assigned 250*l.* of her legacy being the residue of what remained unpaid to the plaintiff, who brings a bill of satisfaction, &c. The Lady Abbess releases for herself and family, all her claims and rights to the legacy, &c. Insisted for the defendant that the legacy was lapsed by her profession she being become thereby civiliter mortua and not able to assign. Secondly, that the legacy never vested per statute 1 Ja. cap. 4. and 3 Car. 1. Harcourt Chancellor declared that the assignment being without a consideration was a trust for M. and that he would as soon decree the legacy to the Lady Abbess as to the plaintiff. Bill dismissed. Mich. 12 Ann. Canc. Darrell v. Darell & al. (E. R.)

(Y. c) Lapsed Legacy; In Respect of the Death of Legatee in Testator's Life.

1. **I** F a man devise a lease or goods to J. S. who dies, and after the deviser dies, the executor of J. S. shall have nothing of this. Plowd. 345. b. Trin. 10 Eliz. Arg.

2. A. had two sisters M. and N. and bequeathed 300*l.* to each of the children of M. and N. and if any of them die before the money is paid, then the money, which should have been paid to such child, shall be divided between the grand-children of M. and N. the said legacy to be paid before any other; M. had issue B. C. D. E. and F. whereof B. and C. died, leaving issue, but all three, viz. B. C. and D. died in the life of A. The court was of opinion, that B. C. and D. being dead * at the time of the making A's will, they could

* So it is in the original, but seems misprinted.

take nothing either by the words or the intent thereof, both which were fully satisfied, because E. and F. were living at A's death to whom A's executor paid 300l. a-piece, and nothing due to the issue of D. Fin. R. 182. Mich. 26 Car. 2. Judd v. Arnold.

3. A. devised to B. his sister 350 l. *on condition that at or before her death she give 200 l. part thereof to her children; she dies in testator's life-time*; per Lords Commissioners the whole legacy is lapsed; for being a devise of money, the absolute property vested in the first legatee. 2 Vern. 116. pl. 112. Mich. 1689. Birkhead v. Coward.

2 Freem. Rep. 107. Birkett v. Coward S. C. per Cur. accordingly; and Finch of

counsel admitted it to be against him.

4. A. devised 300 l. to B. his sister, *willing her to give 200 l. thereof to her child*; B. died in the life of A. Bill by the child for the 200 l. dismissed. 2 Vern. 208. pl. 192. Hill. 1690. in case of Miller v. Warren.

2 Vern. 116. Birkhead v. Coward. S. P.

5. A. devised 300 l. to B. 100 l. *whereof he owes me, which I intend to give to C. his daughter. But my will and desire is that he give the 300 l. to his daughter C. at his death, or sooner if there be occasion for her better advancement and preferment.* A. at making the will was in England, and B. died in Ireland eight days before A. It was insisted that this was in nature of a remainder, and so good to C. and it was admitted that the words *I will, or I desire*, amount to an express devise. Decreed by the Master of the Rolls, that the 100 l. bond be assigned to the administrator of C. (C. being dead) and the 200 l. paid with interest from the exhibiting the bill. Wright K. confirmed the decree on appeal. 2 Vern. 466. pl. 427. Mich. 1704. Eacles v. England.

6. It was insisted that if a legacy is given *A. in trust for B.* though *A. dies* living the testator, the devise shall stand good for the benefit of B. But Wright Keeper seemed to doubt of the point. 2 Vern. R. 468. Mich. 1704. in case of Eacles v. England.

7. If a legacy is given to *one of his executors, administrators and assigns*, and the legatee dies in the life of testator, it was agreed by the court and the counsel on both sides, that in such case, though the executors, &c. are named, yet the legacy is lost; for the words (executors, administrators and assigns) are void, being but *surplusage* and *expressio eorum, &c.* and they are by supposition of law named only to take in succession, and by way of representation as an heir represents the ancestor in case of an inheritance. Wms's Rep. 84. Mich. 1705. Elliot v. Davenport.

8. But it was held that a will may be so penned as that though the legatee dies in testator's life, yet his executors shall have the legacy, but then it ought to appear in the will plainly and by *direct words*, that this was the testator's intention. Wms's Rep. 85. S. C.

9. A. recited in her will that B. owed her 400 l. *bequeathed the debt of 400 l. to B. provided he thereout paid several sums in the will mentioned to his wife and children, and the residue she freely and absolutely gave to B. and willed the executor immediately on her death to deliver up the security, and not claim any of the debts, but executor to release as B. or his executors, &c. should require*; B. died

Wms's Rep. 85, 86. per Ld. Cowper. S. C. — The only question was

whether the *later clause* is not so coupled to the former, as to

be *ancillary and dependant* upon it, viz. If the legacy took effect, then the executor to release, and not to claim the debt as a consequence of it. The court was rather induced to be of that opinion, because it appears by the *devise over of part of the debt* to the wife and children, it was *not the intent* of A. that the will should work by way of *release or extinguishment of the debt*. 2 Vern. 522. S. C. — It was admitted that the *legacy given out of the 400 l. did not lapse* by the death of B. before A. *Ibid.* — The legacy amounted to about 150 l. and the bill was brought by the heir of B. Wms's Rep. 83. S. C.

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10. *I forgive such a debt, or my executors shall not demand, or shall release it*; it was admitted that such words only in the will would have been a good discharge of the 400 l. in the case above, though B. had died in the life of A. 2 Vern. 522. Mich. 1705. Elliot v. Davenport.

11. And it was admitted if a *debt* is mentioned to be *devised to the debtor*, without words of release or discharge of the debt, if the debtor die before the testator, that will be a *lapsed legacy*, and the debt will subsist. 2 Vern. 522. Mich. 1705. in case of Elliot v. Davenport.

Where A. bequeathed the surplus of his estate to B. C. D. and E. to be equally divided be-

12. A devised the *surplus of his estate* to B. C. D. and E. who were his brothers *equally* to be divided; and if any of them die before the estate is got in and divided, his or their share to go to his and their children. D. died in the life of A. but left children. Whether they shall take their father's share? 2 Vern. 653. pl. 581. Hill. 1710. Bretton v. Lethulier.

tween them share and share alike (without more) and one of the four died in the life of A. Ld. C. Macclesfield held, that this devise of this fourth part became void, and became as a *part undisposed of*, and that it could not go to the others, because each of them had but a *fourth part devised to them in common*, and the death of the fourth could not avail them as it would if they had been *joint legatees*, then it would have gone to the survivors, but here it was all one as if a fourth part had been devised to each of the four, which could not be increased by the death of any of them. Wms's Rep. 700 Trin. 1721. Bagwell v. Dry. — S. P. Decreed by Ld. C. King. 2 Wms's Rep. 439. Mich. 1728. Page v. Page. — Ibid. says that S. C. was cited and approved by Lord C. Talbot August 1734.

13. A man makes his will and gives 600 l. to his son John, to be paid with all convenient speed; and gives 500 l. to his son George to be paid in convenient time; and appoints his real estate to come in aid of the personal; and goes on and says, *but in case either of my said sons happen to die before they have received all, or any part of their legacy, then the remaining sum or sums shall go and be paid to the survivor*; one of the legatees died in the life of the testator. Bill is brought by the survivor for the legacy left to the deceased. In this case there was no defence. The Attorney General said, it had been frequently determined, that if a legatee dies in the life of the testator, and there be a survivor created, it shall not be considered as lapsed, because there was a survivor created, but be looked on as an immediate devise, and the survivor shall receive both, and so it was decreed. Sel. cases in Canc. in Ld. King's time 73, 74. Trin. 2 Geo. 2. Hornsley v. Hornsley.

(Z. c) Lapsed

(Z. c) Lapsed Legacy ; In Respect of Legatee's dying before Day of Payment ; The Charge being on Land, or otherwise.

1. **I**F a man *devise* 20*l.* by his testament to *W. N. to be paid in four years*, and he *dies in the first year*, yet his executors shall have it; for this is no condition but a limitation of payment. Br. Conditions, pl. 187. cites 24 H. 8.

The executors shall have it by suit before the ordinary; for this *ibid.* pl. 27.

is a duty by the testament or devise. Br. Devise, pl. 45. cites 14 H. 8. — S. P. cites 24 H. 8. — S. C. cited by Doderidge J. 2 Bulst. 126. Mich. 11 Jac.

2. A. bequeathed 500*l.* to B. *for and towards her marriage*; B. died before marriage. *Quære*, If the executors of B. shall have the 500*l.* It seemed to all as if that the executors should have it. D. 59. b. pl. 15. Pasch. 36 and 37 H. 8. The Queen v. Ld. Latimer.

But the justices of Serjeant's-Inn held contra. Hill. 3 Eliz. in case

where a legacy of money was given towards marriage, to be paid at the day of marriage or at the age of 21. and she died before both; but Dr. Reed said that it is otherwise by the civil law. D. 59. pl. 15. Pasch. 36 & 37 H. 8. the Queen v. Ld. Latimer. — S. P. by Doderidge J. 2 Bulst. 129. cites D. 59. 36 H. 8. Ld. Latimer's case, and says it is a very plain case; for by this he gives her a present and absolute disposition of the sum, and clearly she might have disposed of the same where and as she would, but she making no disposition thereof, her executors should have it.

3. If one devise that B. *shall have* 20*l.* at marriage or 21 years, if B. die before her executor shall take. But otherwise if the bequest had been to B. *to be paid* at her marriage or 21 years of age, for that in the last case it is a duty presently. Per Williams and Yelverton J. D. 59. b. pl. 15. Marg. Mich. 3 Jac. B. R. cites Br. Devise 27.

S. P. by Doderidge J. 2 Bulst. 126. 129. Mich. 11 Jac.

4. A devise of 100*l.* to his daughter when she shall marry, or to his son when he shall be of age, and they die before; in such cases their executors shall not have the money but it is a lapsed legacy, otherwise if the devise were to them to be paid at their full ages, and they die before that time, and make executors; there the executors may recover the legacy in the spiritual court. Godb. 182. pl. 259. Mich. 9 Jac. C. B. Anon.

2 Vent. 342. Trin. 29 Car. 2. Cloberie's case. S. P. — 2 Chan. cases 155. S. C.

5. If a man devise 100*l.* to the eldest son when his second son shall come to the age of seven years, and he dies before he accomplishes this age, yet it is clear the eldest son shall have this 100*l.* when the time prefixed shall happen by effluxion of time. Per Croke J. 2 Bulst. 126. Mich. 11 Jac.

6. Devise to A. and if he dies before he come to 21 years, I make it to my executors. A. dies before 21, yet it shall not go to the administrator of A. 2 Bulst. 123. Mich. 11 Jac. Roberts v. Robert. Adjudged per three justices against Doderidge.

7. A legacy was given to a feme covert to be paid to her 18 months after the death of the testator; she died within that time; adjudged that her husband and not her daughter was entitled to this legacy, because the wife had an interest in it before the time of payment, and

and such interest which he might have released. 2 Roll. Rep. 134. Mich. 17 Jac. B. R. Anon.

8. If a legacy is appointed to be paid after the death of the executor, and the legatee dies before the executor, it is lost. Wentw. Off. Executors 240. quotes Swinbourn.

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9. A. devised 100l. to B. thus, viz. 50l. in one month after the expiration of his apprenticeship, and 50l. within one year after the expiration. B. died after the month, but within the year. Decreed the second 50l. to the administrator of B. with damages. 2 Ch. R. 25. 21 Car. 2. Rowley v. Lancaster.

10. A legacy was devised to a daughter to be paid out of lands mortgaged to the testator. The mortgage became forfeited in testator's life-time, and it was therefore insisted that neither the heir or executor of the mortgagor were bound to pay the money; but decreed the money to be paid to the husband and administrator of the daughter, (she being dead) or the defendants to be fore-closed, and that the husband was well intitled to the legacy. Fin. R. 91. Hill. 25 Car. 2. Clarke v. Knight, Baker & al'.

Yet it seems such a possibility had not been grantable or transferable over by C.

See 2 Vern. R. 759. S. C. cited in the case of Pinbury v. Elkin.

11. Devise of 100l. to A. at 21, and if A. die under age, B. and C. or the survivors of them to have it. B. dies, then C. dies, living A. A. dies under 21. Decreed that C's administrator shall have the 100l. though C. died before the contingency happened. Vent. 347. Trin. 31 Car. 2. Anon.

12. A devise of 100l. to J. S. at the age of 21, and if he dies before then J. N. and A. B. or the survivor of them to have it; J. N. and A. B. died in the life-time of J. S. and before he was of age, and then J. S. died under age. Decreed that the administrator of J. N. who survived A. B. shall have it, though his intestate died before the contingency happened. 2 Vent. 347. Trin. 32 Car. 2. Anon.

13. Copyhold surrendered on condition to pay 200l. to A. at 21, and if she die before 21 without heirs of her body, then to the surrenderer. A. dies before 21, leaving a son; decreed the 200l. to be paid to the son, and the lands to stand charged therewith. 2 Chan. Rep. 214. 33 Car. 2. Rose v. Tillier.

2 Chan. Rep. 286. S. C.

14. Term limited by a settlement to raise portions for younger children payable at 21 or marriage. One of them dies under 21, and unmarried. Her portion shall not be raised for the benefit of the administratrix. Otherwise if the portion was to be raised out of a personal estate. Vern. 204, 205. in pl. 201. Mich. 1683. Lady Poulet v. Lord Poulet.

S. C. cited 2 Vern. 199. and says it was decreed that the administrator should have it, but that he should wait and expect for it till B. should have been 21, and that this was confirmed on an appeal to the House of

15. Devise was to B. when she shall attain the age of 21, or be married, which shall first happen, the sum of 500l. to be paid her with interest. The daughter dies under age and unmarried, her administrator had decree for principal and interest. North Ld. K. once pronounced a reversal of the decree, but being much pressed that testator's intention would be clear in the proofs, he suspended it to hear the proofs. 2 Chan. Cases 155. Mich. 35 Car. 2. Lampen v. Cloberry.

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of Lords, though Lord Nottingham for some time doubted if it should not be paid presently. But it was said that was but an invention to encourage administration. — Decreed per Finch. C. 2 Vent. 342. Clobberries case. — 2 Freem. Rep. 24. pl. 26. Clobberry v. Lampen. S. C.

* It is legacy vested, because it carried interest. 2 Vern. 673. Stapleton v. Cheele. — Ch. prec. 318. S. C. — G. Equ. Rep. 76. S. C. — Skin. 147. pl. 19. seems to be S. C.

16. Legacy to an infant *to bind him apprentice*, he dies before he is of a competent age to be placed out. It shall go to his executor or administrator. Vern. Rep. 255. pl. 247. Mich. 1684. Barlow v. Grant.

2 Freem. Rep. 89. pl. 98. Anon. S. C. & S. P. resolved.

17. A difference allowed by Ld. Keeper between a devise of 500l. to one *to be paid at her age of 21 or marriage*, there it is due, though she died before 21. and where 500l. is devised, *if, or when she comes to 21.* 2 Chan. Cases 155. Mich. 35 Car. 2. Lampen v. Clobberry.

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2 Roll. Rep. 414. Anon. S. P. — To be paid at the age of

21, it goes to the executors, 2 Vent. 342. S. C.

But if in either of these cases the testator had given *interest from his death*, this would be an explanation of his intent to make the legacy and interest vested, and consequently would not lapse, and this been settled in Clobberry's case. 2 Vent. in Yates v. Fettyplace, and several other cases, Ch. Prec. 317. Stapleton v. Cheales.

18. A sum of money is devised out of lands to be paid at a future day; the testator dies; legatee dies. Administrator of legatee shall have it. Cited per Ld. Keeper. 2 Vent. 367. Pasch. 1 Jac. in Ld. Pawlet's case.

2 Ch. Rep. 97. Strickland v. Garrett. — Gpdb. 182. pl. 259.

S. P. — 2 Vern. R. 424. Jackson v. Farrand. S. C. — 2 Vern. R. 508. Cave v. Cave. Where it was devised out of a trust estate yet goes to the administrator it being to carry interest immediately. — It is a standing rule in this court that where a portion or legacy is to be paid out of lands at such a time, or at such an age, if legatee dies before the day, the legacy is sunk in favour of the heir, but if it is to be paid out of the personal estate it vests immediately and is not to be devested by dying before the day of payment. 9 Mod. 106. Mich. 11 Geo. in case of Bateman v. Roach. — S. P. so if it was out of a term for years. Ch. Prec. 318. in the case of Stapleton v. Cheals. — G. Equ. R. 76. S. C. — In such case the portion shall sink, and that as well for the benefit of an *heres factus* as of an *heres natus*; for the former is substituted by the testator in the place of the latter, and the true reason is, that the legacy being given as a portion, when the child dies before the portion is payable there is no occasion for it, and equity will not countenance the loading of an heir for the benefit of an administrator; per Ld. Commissioner Jekyll. 2 Wms's Rep. 276, 277. Pasch. 1725. Jennings v. Looks, and cited the case of Yates v. Fettyplace.

So being charged upon lands and being for a portion, though not by express words mentioned to be for a portion, yet if it appears to be so in fact, it shall sink in the land. 2 Wms's Rep. 276, ut sup.

But if a legacy be chargeable as well upon the personal as real estate then so much thereof as the personal estate will extend to pay shall go to the executors or administrators of the child; but where it is a charge only upon the land it is otherwise. 2 Wms's Rep. 278. S. C. — S. C. cited Arg. 2 Wms's Rep. (611) and afterwards per Lord Chancellor King (612) Trin. 1731. who said he had looked into this case and the case of YATZ v. FETTYPLACE above, and that those authorities shew that there is no difference where the real as well as the personal estate is charged; for in such case as far as the executor or administrator claims out of the latter he shall succeed according to the rule of that court, where these things are determinable, even though the infant legatee dies before the time of payment, but as far as the legacy is charged upon the land, so far it shall on the legatee dying before the legacy becomes payable, sink. And this being the rule which has of late universally prevailed *be the legatee a child or a stranger*, his lordship said it would be of the most dangerous consequence and disturb a great deal of property for him to break into it, and decreed accordingly in the principal case with regard to the legacy charged upon land payable at 25, before which age the legatee died. 2 Wms's Rep. (602.) (609.) (612.) Trin. 1731. D. of Chandos v. Talbot.

A. devised 100 l. to B. to be paid September 29, 1668, and charged it on land devised to J. S. B. died before the day, yet it shall go to B's administrator. Fin. R. 112. Hill. 25 Car. 2. Innocent v. Taylor.

Ld. C. Talbot said, the case of *SMELL v. DEE* weighed but little with him; for first, he did not think it well reported; and 2dly, the reason seems idle. For why may not an uncertainty be transmissible as well as a certainty though perhaps not so beneficial. Cases in Equ. in Ld. Talbot's time 124. Trin. 1735. in case of King v. Withers.

The court said that this case differed from that of *E. of Rivers v. Ld. Derby*. For in that case no time was limited for payment, but in this case payment was expressly to be at twenty-one or marriage. 2 Vern. 92. Ibid.

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N. Ch. R. 193. Taylor v. Wood. S. P.

Godb. 18. S. P.—2 Vern. 650. S. P.

N. Ch. R. 195. cites *Cloberry v. Lampeen*. S. P. decreed in *Cane* and affirmed in *Domo Proc.*

19. A. devised to J. his daughter 1000 l. for her portion charged upon lands to be paid at twenty-one or marriage, and further willed, that in case his son should die before twenty-one, or without issue then he gave the lands to W. R. his uncle and his heirs he making up his daughter's portion 2000 l. J. died an infant unmarried and afterwards the son died without issue. The court took it that the administrator of J. the daughter was not intitled to any part of the 2000 l. and that the judgment in *Ld. Pawlet's* case governed this case; and said, that it appeared that the intention of the testator was that it should be for a portion, and it is expressly called a portion in the will, and then it is no personal legacy, but money to be raised out of the rents and profits of lands, and dismissed the bill as to so much as concerned the 2000 l. 2 Vern. 92. pl. 88. Mich. 1688. *Smith v. Smith*.

20. A. charges lands with 6000 l. for the child his wife was *priveement enseint* of, if a daughter, with clause of entry for non-payment; a daughter is born but died; bill by administrator of the daughter was dismissed. 2 Vern. 208. Hill. 1690. *Norfolk v. Gifford*.

21. Legacy given to A. when she shall attain the age of twenty-one years. A. dies before twenty-one; this is a lapsed legacy; this court has several times made strained constructions of wills to help infants, but never to help an administrator. N. Ch. R. 193. Hill. Vac. 1691. *Taylor v. Wood*.

22. A. devised lands to B. on condition to pay the several legacies, which he had bequeathed to the several persons named in his will, by which he gave one legacy to J. D. when she should attain and come to the age of twenty-one provided if B. fail of payment the legatees or such of them whose legacy should not be paid might enter and detain till satisfied; J. D. before twenty-one died; decreed a lapsed legacy and not a present devise. N. Ch. R. 193. Hill. Vac. 1691. *Taylor v. Wood*.

23. A portion devised to a child with interest, but not to be paid or payable until the child attains twenty-one years or was married. The child dies under twenty-one and unmarried; decreed the portion to the administrator. Per *Jefferies C.* Vern. 462. pl. 440. Trin. 1687. *Collins v. Metcalf*.

24. Where a feme covert has a power reserved to dispose by last will or writing and she makes her will and disposes and the husband subscribes his approbation, in such case the person, to whom she gives, is not legatee but nominee, and if he dies before the wife, it is not like a legacy which is thereby lapsed, but it is only the execution

execution of a trust and the executors or administrators shall take, Abr. Equ. Cases 296. Mich. 1700. Burnet v. Holgrave.

25. A. having entailed his land on his son subject to a mortgage, by will devises his leasehold and personal estate to pay his debts and legacies, and directs if his personal estate is applied to pay the mortgage, it should be kept on foot to make good the daughter's portion, and gives her 3000l. to be paid at twenty-one or marriage, if married with consent, if not but 1000l. she died at six years of age. The portion shall not be raised for the benefit of her administrator. 2 Vern. 416. pl. 380. Hill. 1700. Yates v. Phettiplace.

26. A. devised 300l. to B. but my will is that B. give it to C. at B.'s death or sooner, if occasion be for her better preferment. B. died before A. living C. then A. died; and at sixteen years of age C. died. It is not a lapsed legacy, but C's administrator shall have it, B. being only as a trustee. Ch. Prec. 200. pl. 192. Trin. 1702. Eales v. England. 2 Vern. 466. S. C.

27. A legacy is bequeathed to a mother for maintenance of her child; though the child dies the mother shall have the legacy. Per Ld. Wright. Ch. Prec. 219. Pasch. 1703. in case of Buthnell v. Parsons.

28. A. devised lands to B. in fee, and adds, but it is my will nevertheless that B. pay out of my lands so devised 600l. 200l. to C. at her age of 21, to D. 200l. at his age of 21, to E. 200l. at his age of 21, and 4l. per annum for maintenance until they come to twenty-one and their * portions paid. C. died under age of twenty-one. Nothing vests until she attains twenty-one. 2 Vern. 617. Mich. 1708. Carter v. Bletsoe.

And if B. died before twenty-one then E's 200l. to go to C. and D. and be added to their portions: B. died before

twenty-one. C. married and died before twenty-one, leaving two children; Ld. Cowper dismissed the husband's bill both as to the 200l. and also as to the 100l. because there were no words that vested any interest before twenty-one, as to the 100l. that was governed by the other legacies. Ch. Prec. 267. S. C. — G. Equ. R. 11. S. C.

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29. H. bequeathed by his will in these words, viz. I give 100l. a-piece to the two children of J. S. at the end of ten years after my decease; the children died within the ten years; per Cowper Lord Chancellor this is a lapsed legacy, and shall not go to the executors of the children; for the diversity is where the bequest is to take effect at a future time, and where the payment is to be made at a future time. And though it was objected by Sir Thomas Powis that this differed from the case where a man devised 100l. to J. S. at his age of twenty-one because it is a contingency, whether he attain to that age; but the expiration of the ten years is inevitable; yet the Lord Chancellor answered that wherever the time is annexed to the legacy itself, and not to the payment of it, if the legatee dies before the time of payment, it is a lapsed legacy in that case. 2 Salk. 415. pl. 2. Mich. 6 Ann. Smell v. Dec.

A. devised 20l. to B. at the day of her marriage to be paid by his executors, and she dies before, it is not a lapsed legacy, per Doderidge J. 2 Bullst. 126. Roberts v. Roberts

of a legacy to A. * at twenty-one or to be paid at twenty-one is the same, per Wright Keeper. 2 Vern. 417. — Carth. 52. — Le. 277. † Lady Lodge's case. — † S. P. agreed and S. C. cited Ch. Prec. 318. Stapleton v. Cheales. — G. Equ. R. 76. S. C. — Ld. C. King said that this seemed a very slight and superficial diversity and though it had been established in the spiritual court as to legacies out of a personal estate it deserved no favour where charged on land Trin. 1731. 2 Wms's Rep. 612. D. of Chandos v. Talbot. — In the first case it will lapse, but not in the last. Vent. 342. Trin. 29 Car. 2. Cloberries case. — Per Cowper C. S. P.

— Devise 2. Vera.

2 Vern. 650.——2 Chan. Rep. 25. 21 Car. 2. Rowley v. Lancaster. S. P.——But where in the close of the will was added, if any legatee die before his legacy is payable the same shall go to the brothers and sisters of such legatee, it was held no lapsed legacy but should go over. 2 Vern. 378. Darrel v. Moleworth.——2 Vern. 611. Ledsom v. Hickman. S. P.

30. One being possessed of a very considerable personal estate, part in Jamaica and part in England, and being himself residing in Jamaica, made his will, and thereof several executors, some for his estate in Jamaica, and others residing in England for his estate here, and amongst other things devised in these words, viz. *I give and bequeath to J. S. now under the custody of R. D. the sum of 2000 l. at the age of twenty-one years, to be paid by my executors in England, and devised all the rest and residue of his estate to the plaintiff and died; J. S. having attained his age of eighteen made his will, and thereby devised this legacy, and all his estate to the defendant; and my Lord Chancellor held this a lapsed legacy. Abr. Equ. Cases 295. Trin. 1710. Onslow v. South.*

In this case it is not a devise over, but a contingent or condition precedent, which being fulfilled by death of the wife without issue the devise over may take place, as a new original devise and not as a remainder, per Ld. Cowper Ch. Prec. 485. S. C.——Wms's Rep. 563. pl. 164 S. C.

31. A. wills all his real and personal estate, &c. to his wife, and made her executrix, provided she died without issue by A. that 80 l. should remain to C. after her death, C. died in the life of the wife; adjudged according to the case of 2 Vent. 374. and contra to Swinb. 462, 463. that the legacy was good. 2 Vern. 758. 766. Trin. 1718. Pinbury v. Elkin.

MS. Rep. Dec. 7, 1729. Smith v. Vaughan.

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32. The principal point debated in the case was, That Ellis Terrell by his will in 1715, inter al' devised to his brother Nicholas Terrell and Christopher Haines one annuity of 200 l. a year issuing out of the exchequer in trust that they should pay the same from time to time unto his sister Rebecca Vaughan wife of the defendant Gwyn Vaughan for her life, and after her decease that they should assign the same unto and for the use of all the children of his said sister equally to be divided amongst them, and if she should leave but one child, then that they should assign all to that one child. And declared the said annuity for his separate use. And testator likewise devised another exchequer annuity of 50 l. a year to the same trustees in trust to apply the same to the maintenance and education of his niece Rebecca Vaughan, until she should arrive at her age of twenty-one. And after she should arrive at her said age, then in trust to assign the said annuity to his said niece, her executors and administrators. Testator made his brother Nicholas T. and Haines executors and his brother Nicholas and sister Vaughan residuary legatees. Testator died, and Rebecca Vaughan the niece died before twenty-one intestate, and Rebecca Vaughan the sister likewise died without leaving any child living at her death, and having never had but one child (viz.) Rebecca the legatee of the 50 l. a year, and who died an infant as before.

Two questions were made, First, Whether the 50 l. a year annuity vested in Rebecca the niece, vested in her so as to go to her representative, or was lapsed by her death and fell into the residuum of testator's estate. And, 2dly, as to the 200 l. a year annuity given in trust for the mother, whether, the reversionary interest

terest in that after the mother's decease vested in the daughter during the mother's life, or was likewise lapsed into the residuary estate upon the mother's leaving no child at her death.

As to the first question upon the 50 l. a year to the niece it was very little debated and given up, that it was a vested legacy in respect of the profits given for the maintenance, &c. of the legatee during her infancy, &c. and compared to the case of a legacy given at twenty-one and interest given in the mean time.

But the other question upon the 200 l. was much debated, and his honour after argument held, that it was lapsed, and did not vest in the daughter, but was merely contingent during the mother's life, and that the time of her death was the time when the children were to take, for that the will is clear that testator intended his sister's children, if more than one, should take as tenants in common, and if but one at her death, then that one to have all, whereas if this were to vest in the children that might be in the mother's lifetime, then it would follow that their shares would go to their representatives in case they died before their mother, when yet if there was but one living at the death of the mother, that child was to have the whole, and therefore the division must be at the death of the mother amongst the children as they should then happen to be, and that is making the words of the will consistent in every part.

That the expression of leaving children, &c. has always been understood leaving at the death of the party, and not to leaving generally.

That there is no possible way to preserve a tenancy in common to all, and yet the whole to go to one only child that should survive the mother, and therefore holds that no child was to take but such as was living at the death of the mother, and in this case there being none, the remaining interest in the annuity is to be considered as undisposed and to fall into the residuum of testator's estate. Holds the annuity here, being given to trustees makes no difference.

Nota, That a reversionary interest may vest immediately and be transmissible to representatives was cited **CORBETT v. PALMER.** [383] 26 Feb. 1734. before Ld. Talbot, where the case was that John Corbett by his will gave several specifick legacies, and the residue of his personal estate to his wife for her life, and directed that after her decease and the other legatees paid, the residue should be divided amongst six persons named in his will, and two of them died after testator in the life of the wife, and per Ld. Talbot held, that the shares of those two belonged to their representatives, and declared that if a legacy is given at twenty-one or marriage and the legatee dies before, in that case the legacy is gone, because the condition can never exist. Otherwise whereupon a condition that may exist after the death of the legatee, as in the case in 2 Ventr. 347. Anon. Legatee to J. S. at twenty-one and if he died before, then to A. B. and J. N. and they both die before J. S. and who likewise dies before twenty-one; and de-

creed the legacy to the representative of the survivor of A. B. and J. N.

33. Devise of lands to trustees in fee in trust within six years after the testator's death, to raise and pay 1500 l. to his daughter A. A. dies within the six years; the 1500 l. shall go to her administrator, here being no certain time limited when, but only the ultimate time within which, it shall be raised. 3 Wms's Rep. 119. Hill. 1731. Cowper v. Scot, & al'.

34. One by his will devises that all his debts and legacies shall be paid by his executor out of his personal estate, if that shall be sufficient; but if not, then his executors within twelve months after his death shall sell or mortgage so much of his real estate as shall be sufficient for that purpose, and (inter al') gives a legacy of 1000 l. to J. S. who dies within a year, and the personal estate is not sufficient; this is a vested legacy, and shall be paid to the executor of the legatee, though charged upon land; for the words, within twelve months, denote the ultimate time; but the executors may pay the legacy sooner. 3 Wms's Rep. 172. Hill. 1732. Wilson v. Spencer.

35. If a legacy be given out of land to J. S. payable at 21, and J. S. dies before 21, the legacy sinks; secus where the legacy is given out of the personal estate. 3 Wms's Rep. 138. Pasch. 1732. Gordon v. Raynes.

MS. Rep.
Mich. 12.
Geo. 2.
Hall v.
Terry,

36. Michael Terry by will gives to his nephew Stephen Terry and his heirs, all that moiety of the manor of Ilfield in the county of Southampton, and the advowson and right of presentation, subject to the settlement made on the marriage of his wife, so as the said Stephen Terry and his heirs do and shall within the space of one year then next after the said manor and premises shall come into possession, pay, or cause to be paid, divers sums of money to divers persons hereafter named, and particularly to his executors and to Elizabeth Oads and others 100 l. each, and directs that the said manor and premises shall be charged with the payment of the same; and after giving divers pecuniary legacies, gives the rest and residue of his real and personal estate, his debts and legacies being first thereout allowed and discharged to Thomas Terry and the said Stephen, whom he makes his executors. Eliz. Oads died in the life of testator's wife the jointress, who died in and plaintiff as representative of Eliz. Oads brings her bill against Thomas and Stephen to have her legacy or sum of money given to her by the will, and they admit assets, but say and insist that this was not to be paid out of the personal estate, and the defendant Stephen Terry insists that this sum of money is not to be raised at all, she dying in the life-time of the jointress and before the premises came into his possession.

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Fazackerly for plaintiff insisted that this sum of money was a vested interest in Eliz. Oads, and transmissible to her representative though the time of payment was postponed, which was merely for the convenience and benefit of the devisee, who had only a reversion in the life of the jointress; and therefore testator intended that he should not pay it during her life, not that it should sink into the inheritance

heritance if Eliz. Oads should not survive the wife, or that it should be subject to any contingency at all; that this was such an interest in her that she might have released it, which proves that it was transmissible, and that from the nature of the legacy it was so, and relied upon the case of KING AND WITHERS determined by Lord Talbot, where all the contingencies did not happen when the parties died, yet he held that the money given should go to the representative though to be raised; and cited the case

v. SPENCER in 1732, where a sum of money was given to be paid within a year after testator's death charged on lands, and legatee died within the year, yet the money was raised; he insisted that both real and personal were liable to the payment of this money, so that if it was not to be raised out of the real they might resort to the personal estate, which is the proper fund for payment of legacies; and that if this is considered as a legacy, there can be no pretence for the executors not to pay it.

Attorney General and Mr. Brown contra, that this is not a legacy, but a sum of money charged on the real estate; that this is a fund particularly appropriated by the testator for the payment of this money, and that the latter words do not amount to charge the personal estate; for this is not a legacy; and therefore if plaintiff had sued defendant in the spiritual court for this money, the temporal courts would have granted a prohibition; that though by the rules of the spiritual court which are transmitted in this court in cases of legacies, if a legacy is made payable at a future day and legatee dies before the day, it shall survive to the representative, it is otherwise where a sum of money is payable out of land; the rules of the common law and the practice of this court have put such charges on real estates upon a different foundation; for this court considers them as conditions at common law for the benefit of the real estate, that it should not be incumbered with remote sums of money; and cited BRIGHT AND NORTON, determined by Lord Talbot, where father and son who was tenant in tail of lands which had been settled on the marriage of his father joined in a recovery to cut off the entail on the marriage of the son, and declared the uses thereof to the father for life, remainder to the son, &c. and there was a term raised to take effect after the death of the father, in trust to raise and pay the sum of 1100l. within the space of six years after the death of the father, with interest at 5l. per cent. till the 1100l. shall be raised. The second son died in the life of the father, so that the time for payment of the money was not come, and it was held that the money should sink into the inheritance. And cited also the case of DUKE CHANDOS V. TALBOT, where Sir J. D. gave 500l. to to be paid out of his real and personal estate at the age of 25, and he died before; and Lord King was of opinion that it should not be raised.

Mr. Brown said, there was a cause before Lord Talbot concerning an appointment of a sum of money to be paid out of land after the death of the father, who left several children unprovided for, there held the money should not be raised. He cited [CARTER V.

BLETSON,] 2 Vern. 617. YATES V. FETTIPLACE 2 Vern. 416, 417. where a father having mortgaged his real estate afterwards entailed the same.

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And per Lord Chancellor. On this question hath been variety of determinations, many of which are not to be reconciled to one another, and this court has laid hold of small differences to reconcile one case to another. The question is, whether this 100*l.* is to be raised out of the real or personal estate?

It must be admitted that the general rule of this court is, that where a sum of money is given by will to be paid out of the real estate, and legatee dies before time of payment, it shall sink into the inheritance, and that this is so whether the money is given as a portion or not; but it is said by the plaintiff's counsel that this case falls not within that general rule. 1st, That this money is not only charged on the real estate but also on the personal estate; but this will not serve the plaintiff in the present case, and the authorities are against this distinction. It is plain it cannot take place on this will, for the money is not made payable out of the personal estate for the reasons before given, but was charged only on the real estate, but if it had been payable out of the personal estate the determinations are stronger; that where a legacy is charged on land and personal estate it shall so far partake of the nature of a sum of money issuing out of land, that if she dies before time of payment it shall not be raised. 2 Vern. 416. JENNINGS AND ROCK'S, DUKE OF CHANDOS AND TALBOT, PROUSE AND ABINGTON.

2^{dly}. That it is vested, but only the time of payment postponed for the convenience of the reversioner. As to that the distinction between annexing the time to the substance of a legacy and the payment of it is not allowable on legacies charged on lands, but if there was any thing in that distinction the words of the will will not warrant it, for here is no gift of money but only a direction to the devisee to pay this money when he shall be in possession of the premises; so that this is not like the case of an original gift of a sum of money and where the time of payment is postponed, which is *debitum in presenti solvend. in futuro*, and if a testator should direct an executor to pay a legacy, as this is, out of the personal estate, and legatee should die before, I should make no doubt but that it would have been transmissible; for the direction of payment is the gift, and the time of payment is annexed to the gift, and if the party dies before, it is lapsed.

3^{dly}. It is said that the time of payment here is not taken from the nature of the legacy or the circumstances of the legatee, as in the case of a portion; but there is no difference at all between a portion and any other sum of money given generally to a stranger by will; and in either case, if the party dies before the time of payment, it is not transmissible.

Another distinction has been aimed at between a sum of money to be raised by will and by deed, but that distinction has been exploded, and the case of KING AND WITHERS did not go on that distinction; in that case there were two times mentioned, or rather two things to create a title to the party,

There

There was a time of vesting, and the time of payment was the age of 21 or marriage, both which the party had attained; but there was another contingency, which must happen before the portion could be raised, which was the failure of issue male by the brother, and that it did not happen till after death; but the foundation of that case was, that the time of payment of it had happened in her life-time, though the contingency had not.

Here is no contingency but the time of payment, and that is the time of vesting, for nothing vests till that time. As to the case of WILSON AND SPOONER, that differs from this, for there the legacy was vested; there was a particular time of vesting, but the testator gave the party time to raise it, but there was an absolute gift of it before. The case of BRIGHT AND NORTON is a strong case, but what I ground myself upon is; that the direction of payment is the gift, and dying before here is no gift, and so dismissed the bill.

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(A. d) Legacy Extinct. In what Cases.

1. **L**EGACY is extinct by *taking bond for it*. Yelv. 39. Het. 166. Champne's case.
 Mich. 1 Jac. B. R. Godwin v. Godwin.

8 Mod. 328. Cuband v. Dewsbury.

2. Where the *statute of limitation* was pleaded in bar to a legacy demanded due 20 years since, Lord Chantellor held that a legacy was not barred by the statute, nor ever had been so held. 2 Freem. Rep. 22. pl. 20. Trin. 1677. Anon.

3. A sum of money devised to A. to *dispose* as the testator shall appoint by a note, who dies without appointment; a good bequest to A. Ch. cases 198. Pasch. 23 Car. 2. Martin v. Douch. Vern. 224. Attorney-General v. Silderfin.

4. Legacy given out of a term for years; if the term determines the legacy is extinct. Fin. Rep. 464. Mich. 32 Car. 2. Morgan v. Morgan.

5. I give to B. 500 l. which J. S. hath now in her hands of mine, as by her bond appears; J. S. 10 years before testator's death discharged the bond; yet the legacy was resolved to be payable; because it is a pure legacy, neither *legatum nominis* nor *legatum debiti*, and the words are only to shew that he meant the legacy should be as certain to B. as he could make it. Raym. 335. Mich. 31 Car. 2. in Cam. Scacc. Pawlet's case. S. C. cited 2 Vern. 682. Hill. 1711.

6. A legacy was devised out of debts due in several counties, and they were all called in before the testator's death, and yet the legacy remained good. Cited Raym. 335. Mich. 31 Car. 2. as adjudged in the case of Theobald v. Wynn. And. S. P. cited as adjudged Hill. Term 1671. in case of Squibb v.

Chicheley, and says that a difference was taken between a legacy in *nummis numeratis* and a *specifick* legacy; for in the first case the legacy will remain, though the debt ex quo be paid in, but the *specifick* legacy may be lost by being altered.—So where the legacy was of more than the debt, out of which, amounted to; yet such sums being expressly devised, and there being affects both of the testator's, and also of testator's father, who directed the like sum to be left by testator (who was his

his father's executor) to the devisee, it was decreed to be paid. Fin. R. 152. Mich. 26 Car. 2. Petteward v. Petteward——— 2 Wms's Rep. 331. per Ld. C. King Hill. 1725. in case of Rider v. Wager. cites Raym. 335. Pawlet's case and Swinb. Part Ap. 447. and 2 Vern. 681. Orm v. Smith.

7. A legacy is given to be paid out of such a debt; if the debt fails, the legacy fails also. 2 Ch. cafes 116. Trin. 34 Car. 2. Culpepper v. Alton.

8. J. S. devised land to C. his younger son by a second venter in tail male, remainder to A. provided if the land should come to A. (his eldest son by a first venter) then A. or his heirs should within four months after the estate should come to him or them, pay 1000l. to his daughter, or in default the trustees in the will named to enter and raise it. J. S. dies; C. enters, levies a fine, and suffers a recovery, but the wife of J. S. having a jointure, and she not surrendering, it was good only for a moiety. The wife dies; A. dies; then C. dies. Decreed that though the estate never came to A. but to his heirs, and though a moiety only came to the heir, yet the whole 1000l. was a legal subsisting charge, and the daughters did not claim under but paramount C. and therefore there was no apportionment. 2 Vern. 359. Mich. 1698. Hooley v. Booth.

[387] 9. If a legacy be given to a young girl when she marries, and she marries before she is viri potens, she shall not have it; for it must be intended a compleat marriage; per Ld. K. Wright. 2 Freem. Rep. 244. Hill. 1700. in case of Yate v. Fettyplace.

10. Devise of 1500l. to A. B. and C. to be paid at their respective marriages, and if any die, her legacy to go to the survivors. A. dies unmarried; the survivors are not intitled to A's share till their respective marriages. Per Cowper C. 2 Vern. 620. pl. 556. Mich. 1708. Moore v. Godfrey.

(B. d) Legacy Lapsed.

Where it shall survive to the other Legatees.

1. IF a lease of land be made unto a monk for life, the remainder unto a stranger in fee, this remainder is void, &c. If land be devised unto J. S. for life, the remainder unto T. K. in fee, and J. S. dies before the deviser dies, and then the deviser dies, it is a good remainder to T. K. and shall presently take effect, &c. Perk. S. 568.

2. The testator had two executors, and devises to them residuum bonorum, &c. after the debts and legacies paid; one of them died, his administrator sued the surviving executor to have a moiety of the surplusage. The cause came to a hearing. The defendant insisted that the executors were joint-devisees, and took the residue as legatees, not as joint-executors. The Lord Keeper decreed for the plaintiff; for in case of executors the testator intended an equal share to his executors; and by Ch. J. Roll's advice it was decreed, that

that where a devise was to two equally, notwithstanding which word (equally) the devisees were joint, yet the intention prevents the survivorship. The cause was disputed, but to the dissatisfaction of the bar decreed. For where the intention is secret and not declared, the secret intent must give way to the legal intent. And if an administrator, then an administrator de bonis non must have it. Chan. cases 239. Mich. 26 Car. 2. Cox v. Quantock.

3. A. devised goods to B. and C. and after the executor assents to the legacy, and then dies; the executor of B. sues in the ecclesiastical court for B's part, for there is no survivor by the ecclesiastical law in such case, and sues a prohibition and declares, and upon demurrer and argument adjudged, that the prohibition shall stand; for by the assent of the executor the interest is vested, and becomes a chattle, and governable by the common law. 2 Lev. 209. Mich. 29 Car. 2. B. R. Bustard v. Stuckley.

4. A devise of 100l. to J. S. at the age of 21 years; and if J. S. died under age, then J. N. and A. B. to have the 100l. or else the survivor of them. A. B. and J. N. die both in the life of J. S. and before the age of 21 years. The administrator of J. N. who survived A. B. sued and obtained a decree for the 100l. for though he died before the contingency happened, yet his administrator should have it. 2 Vent. 347. Trin. 31 Car. 2. Anon.

5. Devise of 100l. to A. and B. viz. 50l. to each of them at their respective ages of 21, or day of marriage, which should first happen, and if either die before, survivor to have all, &c. A. died before the testator; B. shall have the whole 100l. 2 Chan. B. 187. 32 Car. 2. Prigg v. Cley.

ended there, and one had died, it would survive, and then the viz. is only a severance in case both live till payment, and the last clause is a new substantive devise of the whole to the survivor. Ch. Prec. 37. pl. 39. Mich. 1691. Scoolding v. Green.—Abr. Equ. cases. 298. S. C.

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By the first clause it is a joint devise, and if the will had

6. A. had three daughters and devised to his three daughters 540l. equally to be divided between them, that is to say 180l. a-piece, but if any of them died without a child her part to go to the survivors, one of the daughters married J. S. and before the portion paid, died without issue. J. S. exhibited his bill against the executor, and the two surviving sisters, and had a decree for the 180l. For a sum of money cannot be entailed. 2 Vent. 349. Pasch. 32 Car. 2. in Canc. Broadhurst v. Richardson.

7. A. makes B. and C. his executors, and directs 2000 l. to be laid out in land for the benefit of his wife for life, and then to his executors to be equally divided between them. The wife and one of the executors dies before any disposition made of the money. Finch C. decreed that this money should not survive. Vern. 32. pl. 30. Hill. 1681. Thicknes v. Vernon.

Sty. 211.
Hurd v.
Lenthall.
S. P.

8. A man devised to his executors, or makes several men his executors, the survivor shall carry all; but where a term is devised in common share and share alike, there shall be no survivor. 2 Chan. Cases. 65. Trin. 33 Car. 2. Draper's case.

9. A. makes B. executor and then gives the residue of his goods to the disposal of B. and C. B. dies. This interest or moiety of the residue

fidue does not survive to C. in this case of a *legacy* as it would in a gift of goods at common law. 2 Jo. 161. July 5. 33 Car. 2. before commissioners delegates. Taylor v. Shore.

10. A. devised the *surplus* of his estate to his two nephews, equally to be divided between them, and appoints his executors to lay it out for their benefit. One of them died in testator's life-time. The whole was decreed to the survivor, and not to the executors, the testator not intending them any benefit; for though by the first words it is several, yet by appointing the executors to lay it out for their benefit, it is made joint again. Vern. 425. pl. 400. Hill. 1686. Cock v. Berjsh.

S. C. cited by the Master of the Rolls. 2 Wms's Rep. 532. Trin. 1729. in case of Cray v. Willis, and decreed by him in that case according to the opinion mentioned of Ld. Jefferies.

11. A. devised the *surplus* of his estate after debts paid to B. and C. B. dies. It was adjudged in the delegates by the Ld. North, and now confirmed by Jefferies C. that this was a *joint devise*, and should survive to C. And Jefferies C. was of opinion that if A. had made B. and C. executors and B. had possessed a moiety of the goods and died, it would have been all one. Vern. 482. pl. 471. Mich. 1687. Lady Shore v. Billingly.

12. Money devised to be laid out in land and settled on the children of J. S. J. S. has two A. and B. Land is *purchased and settled* on them and their heirs. A. dies; decreed that it should not survive. 2 Vern. 46. pl. 44. Pasch. 1688. Sanders v. Brown.

13. Two devisees of 500*l.* a-piece took a joint mortgage to both of them for payment of their legacies with interest; by the death of one nothing shall survive to the other, because the mortgagees were trustees for each other, and the mortgage which is only a security makes no alteration in the case. Carth. 16. Mich. 3 Jac. 2. B. R. Anon.

14. Devise of 1500*l.* to A. to be paid him at 21, to B. (the same) so to C. and to D. in case one or more of them die before, then his or their legacy, &c. to be divided among the survivors. B. died in the life of testator, yet B's legacy shall go to the survivors. 2 Vern. 207. pl. 192. Hill. 1690. Miller v. Warren.

15. If a legacy is devised to A. at 21, and if A. die before, to B. Though A. dies in the life of the testator, the legacy shall go to B. 2 Vern. 208. in case of Miller v. Warren.

S. P. Chan. Prec. 471. Pasch. 1717. Northey v. Burbage. — Wms's Rep. 343. Hill. 1716. Northey v. Strange.

16. Several legacies of 50*l.* to A. B. and C. payable at 21 or marriage, and adds if any legatee die before his legacy is payable, it shall go to the brothers and sisters of such legatee. A died in the life of the testator; adjudged it was no lapsed legacy, but should go to the survivors. 2 Vern. 378. Trin. 1700. Darrel v. Moleworth.

17. A. devised an estate to his wife for life, and after to the plaintiff his niece, and her heirs, upon condition and to the intent that she pay 400*l.* to such person, as his wife by her will in writing, or any other writing, should direct and appoint, and dies; the wife after mar-
ries

ries a second husband, and then makes a will in writing, and thereby reciting the power given her by her former husband's will, appoints the 400l. to be paid to her husband, his executors or administrators, and that when he shall have fully received the 400l. he shall pay 100l. out of it to B. 50l. to C. and 50l. to D. and makes her husband her executor, and then goes on and says, that she has published this her last will and testament in the presence of three witnesses; and the husband subscribed that he does approve of this will; afterwards the husband died before her, and makes her executrix of his will, and residuary legatee; then B. and C. die both intestate, and afterwards the wife dies, and the defendants take out administration to her, with the will annexed, and also administration to B. and C. and the question was, whether this appointment being made by will, and the appointee dying before the appointer, this should be in the nature of a legacy, and so the appointment void, the testatrix surviving the nominee; and my Ld. Keeper held, that if it was a thing purely testamentary, it would be plainly a lapsed legacy; but in this case the 400l. was not in its own nature testamentary, but they take as nominees; and it is but the execution of a trust; and decreed the money to be paid. Eq. Ab. 176. pl. 2. cites Mich. 1700. Burnet v. Holgrave.

18. A. devised 300l. a-piece to his three daughters A. B. and C. at 21 or marriage; if any die before, to go to the survivor. B. died in the life of the testator. B's 300l. shall go to the two survivors. 2 Vern. 611. pl. 548. Trin. 1708. Ledsome v. Hickman.

19. A man devises all his lands to his executors for 10 years, and that after the 10 years 100l. should be paid out of them to H. and A. provided that if neither of them were living, then nothing was to be raised. H. dies before the 10 years are expired, his executor or administrator shall have nothing, for the legacy is lapsed, but A. shall have her portion. Per Ld. Chan. Cowper Mich. 6 Ann.

20. A. devised the surplus to his four brothers B. C. D. and E. and if any of them die before his estate is got in and divided his share to go to his children. B. died in the life of the testator, leaving children. Per Cowper C. though B. died before A. yet still B. died before the estate was gotten in and divided, and as to the objection that his (share) is to go to his children, whereas no share was ever vested in him, that * is to be understood the share intended him. 2 Vern. 653. Paich. 1710. Bretton & Ux. v. Lethuelier.

E. to be equally divided share and share alike, and if either of them die, then to the survivors of them. B. dies, and after the debt is recovered. The representative of B. shall have no share; for the word (survivor) must signify something, and therefore it shall be construed, if any of them die before the money received. M.S. Tab. Jointenants, cites 16th of Jan. 1707. E. of Bindon and Suffolk.

Cites the case of Ledsome v. Hickman. — A devise was of a desperate debt due from the crown to B. C. D. and

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21. A. had two sons B. and C. and two daughters L. and M. and bequeathed 1500l. to C. and 1000l. a-piece to L. and M. and if any of his three younger children die before 21 or marriage, then the portion

portion of him or her so dying should go over to the survivors; and gave his real estate to B. his eldest son, chargeable with those portions. L. died within age and before marriage; and after C. died also within age and before marriage in the life of A. After the death of C. there was another son born, whom A. named C. and afterwards A. by a codicil at the bottom of the will, confirmed the will thereby, taking notice of the other son, and gave 500l. to his son C. and his surviving daughter, over and above what he had given them by his said will. Lord C. Harcourt decreed, that the share of L. vested in C. should not upon C's death survive with C's 1500l. because the portion of L. became vested in distinct shares in the survivors, and there were no words for creating a jointenancy of these shares; but upon arguing upon other points reserved before Lord C. Cowper afterwards, it being objected that C. dying in the life of A. the 1500l. became a lapsed legacy, and should sink into the estate, his lordship said it was improper to call this a lapsed legacy, that it was a portion given over, and should take effect, that the making the codicil was a republication of the will, and amounted to a substituting the second C. in the place of the first C. as if he had made his will a-new, and had wrote it over again, by which new will the second must take, and that the fixed intention of A. appeared that C. should have more than M. whereas if the 1500l. should be taken to be a lapsed legacy, M. should have twice as much as C. Wms's Rep. 274. Hill. 1714. Perkins v. Micklethwaite.

22. A. devised 1200l. among the four children of B. viz. C. D. E. and F. to be distributed at the discretion of B. but not to be compelled to pay it within 12 months after A's decease. C. died in the life of A. B. died within six months after A. Adjudged the whole 1200l. was a subsisting legacy, and till an apportionment made no particular interest vests in any one child. 2 Vern. 744. pl. 652. Hill. 1716. Bird v. Lockey.

23. A. made his wife executrix, and bequeathed 900l. to be paid immediately after his death to J. S. in trust to place it at interest, and pay the produce to his wife for life, if she continued so long a widow, and after to divide the same equally among his three daughters B. C. and D. at their respective ages of 21 or marriage; provided that if all his three daughters die before their legacies become payable, then the mother to have the whole. The wife married; B. and C. died under age, and unmarried. Ld. C. Macclesfield decreed the whole 900l. to D. for the mother was excluded, unless the contingencies had happened, and neither the share of B. or C. was vested so as to be subject to the statute of distributions; for if all had died before 21 or marriage, the mother had had the whole. 2 Wms's Rep. 69. Trin. 1722. Scott v. Barge-man.

24. One has two sons A. and B. and three daughters, and devises his lands to be sold to pay his debts, and as to the monies arising by sale after debts paid, he gives 200l. thereout to his eldest son A. at 21, the residue to his four younger children equally. A. the eldest dies

dies before 21. This 200 l. shall go to the heir of the testator. 3 Wms's Rep. 20. Mich. 1727. *Cruse & al' v. Barley and Banfon.*

25. *I give to A. B. and C. 1000 l. a-piece of my capital stock in the East-India Company, and the interest thereof to them for their use, and if any dies, then to the survivors, or survivor share or share alike; and my meaning is, that the interest shall be paid to their father to be improved for their use.—C. died an infant, by which his share survived to A. and B. Afterwards B. died. The Master of the Rolls held, that the share which B. took upon C's death does not survive to A. but will go to B's administrator, which in this case was her father; had they not been distinct legacies, it might have been another question; but being intirely distinct, and not even so much as tenants in common, the case is the same as that of BARNES v. BALLARD before the Lord King June 1, 1727, where it was decreed for the administrator, and agreed with Ld. Ch. J. Holt's opinion cited in the case of Woodward v. Glasbrook. 2. Vern. 388. and said that this share goes to the administrator by the words share and share alike, which are tantamount to the words equally to be divided, and decreed accordingly. Cases in Equ. in Ld. Talbot's time 124. Trin. 1735. *Rudge v. Barker.**

26. *Francis Basset, grandfather of the now plaintiff, had by his will given 4000 l. among his younger children, payable at 21, and had subjected his real and personal estate for the payment of it; the personal estate was sufficient; and now the question was, whether the legacy being to be raised out of a mixed fund, and one of the children dying before she came of age, whether her part of the legacy was to sink for the benefit of the real estate, or was transmissible for the benefit of the other children?*

MS. Rep. in
Canc. co-
ram Lord
Hardwicke
Lincoln's-
Inn, Dec.
19, 1744.

It was said, as there has been no case cited that where a legacy has been payable out of both personal and real estate, and the personal sufficient, that the legacy has ben lost; I will not make such a case, and indeed the authorities are to the contrary; and cited 2 P. W. fo. 276. 601. and if we were to determine otherwise, we must go into the ecclesiastical court for it.

(C. d) Devise Lapsed, or forfeited.

Where it shall vest in another to whom it is limited over.

1. **I** N affise where a man devised to A. for life, upon condition to be chaplain and pray for his soul, the remainder to the commonalty of B. in fee to pray ut supra, and A. held for six years, and was no chaplain, and was of such age as he might have been chaplain immediately at the death of the deviser, the heir may enter, and therefore the

But after the justices excited the jury to say for the plaintiff in affise; by

which they the commonalty has lost the remainder. Br. Devise, pl. 16. cites said that the plaintiff 29 Aff. 17.
was seised and disseised, and this was for conscience of the remainder as it seems, quære. Br. Conditions, pl. 111. cites S. C.

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2. Note, it was agreed that where a man devises his land to A. for life, the remainder over to B. and dies, and A. will not take the land nor benefit by the devise, yet after his death B. shall have it, and he may well enter and shall have the land according to the devise; for this takes effect by the death of the devisor. Br. Devise, pl. 14. cites 37 H. 6. 37.

3. *Contra* upon a gift, if the first will refuse the livery of seisin, he in the remainder has not any remedy; for this cannot take effect but by the livery. Ibid.

4. The father bequeathed his goods to his son when he shall be of the age of 21 years, and if he die before; that then his daughter shall have them; the son dies long before the said age of 21 years. Adjudged that the daughter shall have them immediately after the son's death, and not tarry till the son would have been 21. And. 33. pl. 82. Mich. 4 E. 6. Anon.

5. Clause in a will, that if any legatee should binder or oppose the execution of the will, then such person should lose the legacy bequeathed. The plaintiff claimed the benefit of the forfeiture by reason of the defendant's contesting and opposing the execution of it; but the court declared its opinion to be, that no advantage ought to be taken thereof, but that the defendant ought to have her specifick legacies bequeathed by the will. 2 Chan. Rep. 105. 27 Car. 2. Moseley v. Moseley.

6. One devises, after debts and legacies paid, the surplus of his estate to his wife and son John equally, whom he makes his executors, but if she should marry, that then she should render the right of being an executrix to the testator's son R. and he to be partner with his brother John in the executorship. The wife marries again; she thereby loses her right to the surplus, and to the executorship. 2 Vern. 308. pl. 299. Hill. 1693. Barton al' Stone v. Barton.

7. Legacy devised to A. to be paid at the age of 21 or marriage, which shall first happen, so as such marriage be with the consent of B. if not, devise over; A. marries without consent, and dies before 21, the legacy is gone. Sel. cases in Chan. in Ld. King's time 26. Trin. 11 Geo. Piggot v. Morris.

8. One gives a legacy of 200 l. a-piece to his children, payable at 21; and if any of them die before 21, then the legacy given to him so dying to go over to the surviving children. One of the children dies in the life of the testator; though this legacy lapses, as to the legatee dying under 21, yet it is well given over to the surviving children. 3 Wms's Rep. 113. Trin. 1731. Willing v. Baine,

(D. d) Ademption of a Legacy. What is.

1. **A.** By will gave his daughter *M.* 1000*l.* to be first paid after his debts, besides a share out of the dividend of his estate. Afterwards, on her marriage, an agreement was made for what she should have out of *A.*'s estate, and that it should be only 1100*l.* and that was to be in full of what was intended her thereout. Decreed by the Master of the Rolls, and confirmed by the Lord Chancellor, that the 1100*l.* was to be in full of what *A.* was to have out of the said estate. 2 Chan. Rep. 35. 21 Car. 2. Hale v. Acton.

2. *P. devises to R. a sum of 500*l.* which the lady C. hath now in her hands of mine, as by her bond made to me and my heirs appears, and makes no executor. But the 500*l.* was paid in by the lady C. ten years before the testator died.* The legacy is due though the security was altered, it being a pure legacy, not *legatum nominis* nor *legatum debiti*; and the words shew that he intended the legacy should be as * certain as possible. Raym. 335. Mich. 31 Car. 2. in Cam. Scacc. Pawlett's case.

where a devise was of a legacy out of several debts due in several counties, though they were called in before the testator died, yet the legacy remained good, and there is a difference between a legacy in numeral and a specific legacy; for in the first case the legacy remains though the debt ex quo is paid in, but the specific legacy may be lost by being altered.

And the counsel for the legatee cited Digest de Legatis, &c. 96. and also Theobal and Wyn's case lately adjudged,

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3. *I give to B. 500*l.* viz. the bond and judgment for 400*l.* due to me from A. and 100*l.* in money.* The testator received almost the whole debt, and took a new bond for the residue and died; decreed to pay it. 2 Vern. 681. Hill. 1711. Orm v. Smith.

Ibid. cites Elliot v. Davenport. —The difference is, where the

money is paid in voluntarily by the debtor, and where the testator recovers it by suit. In the first case the legacy continues still good, because the money only comes home to the personal estate; but in the other case the testator, suing for it, intended to make it his own, and so would not leave it to the legatee to recover; per Lord Harcourt. G. Equ. R. 82. Orm v. Smith. —Same distinction taken by the Master of the Rolls. But where in the principal cases 550*l.* in the hands of *E.* was bequeathed to *S.* though before the making the will testator had ordered some payment out of the 550*l.* this is no ademption, and none of the payments being made, but the whole 550*l.* standing out, the whole was decreed. 2 Wms's Rep. 164. Trin. 1723. Crockat v. Crockat. —But if the testator had, after the making the will, drawn out part of this money, this had been an ademption pro tanto. Ibid.

4. *B. and C. were each indebted to A. in 2000*l.* by bond; afterwards A. by will gave these two sums to F. S. and devised away the surplus of her estate with a proviso, that if all or any part of those two sums should be paid in before the testatrix's death, then she gave to F. S. so much money as the principal money so paid in should amount unto as the case should fall out.* Afterward *A.* released in her lifetime the 2000*l.* to *B.* without receiving any part of the money, and then died. *J. S.* died intestate, and *B.* who was her brother administered to her and demanded the 2000*l.* released to himself, and also the 2000*l.* due on the bond of *C.* In this case *Ld. C. Parker* said, that he could not approve of the * diversity, that if testator give a debt by will and afterwards calls it in, this must be a revocation, secus if it be paid in unasked for by the testator; and as to the release,

* Same diversity taken Arg. and thereupon

decreel. 2
Wms's
Rep. 331.
Hill. 1725.
Rider v.
Wager.

lease, he held it the same as if the will had said (if these debts are paid and discharged;) and as to an objection that B. (who is the plaintiff) or administrator to J. S. claims a double advantage of this debt as first being given him by the release, and then he takes it over again by the will as administrator, his lordship observed that this claim as representing his sister is *en autre droit*, and as if J. S. was alive and made her claim, and that it must be liable to her debts if any were, and is the same as if any other person had been her executor or administrator. Wms's Rep. 461. Trin. 1718. E. of Thomond v. E. of Suffolk.

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5. A. by settlement was tenant for 99 years if he so long lived, with power to charge 2000l. remainder to B. in tail; afterwards A. and the trustees and B. joined in a recovery and declared new uses, viz. to A. for life, remainder over and so destroyed the power of charging. A. bequeathed 1000l. legacy out of these lands. It was insisted, that though this might not be good as a charge, it might however take effect as a legacy, which was not hurt by making an additional security. Ld. C. Macclesfield said, that here is a particular provision for this legacy, and that it is possible a legacy may be charged upon a certain fund, which failing, the legacy may be lost; that it is material that this bequest is grounded upon a power, and may be thought only an execution thereof, which if void, must void the bequest also; and it is also observable, that the will gives the residue to the testator's eldest son; so that to make this legacy good, the legatee, who is otherwise provided for, must take it away from another child; and it is still harder that the legacy by this means will be taken away from an heir in order to be given to a younger child, and that a charge upon land seems not so strong as a gift of a legacy; but at length it weighed with the court that the land amounted to 1000l. a year, and the design appeared to be to leave the younger the two several sums of 1000l. one expressly charged upon the personal estate, and the other upon the land; his lordship saying, that if a legacy was given to J. S. to be paid out of such a particular debt, and it did not appear that there was any such debt, or that the fund should fail, yet still the legacy ought to be paid, and the failing of the modus appointed for the payment should not defeat the legacy itself. Wms's Rep. 778. Hill. 1721. Savile v. Blacket.

But the court admitted, that where a devise is to A. for life remainder to B. and A. dies in the testator's life, there upon testator's death B. shall have the whole; for the

6. B. being indebted to A. in 1000l. A. devised 500l. part thereof to D. the second son of B. and the residue to the younger children of B. and the same to remain in B's hands till the younger children should be capable of receiving it, and the share of any dying before such time to go to the survivors or survivor. The whole debt was paid to A. and D. died, living A. then A. dies in the life of the younger children. Ld. C. King held, that it could not be intended that the survivors should take unless D. the legatee should have survived the testator so as the right to the legacy should have become vested in him, but that he dying in A's life, nothing could survive from him. 2 Wms's Rep. 328. Hill. 1725. Sir Barnham Rider v. Sir Cha. Wager & al'.

cases seem to be within the plain intention of the testator, but that in the principal case it was quite

quite a strain to support a legacy given out of a fund which the testator himself had by his own voluntary act put an end to. Ibid. 131.

So of a devise to A. and B. if A. dies in testator's life-time, and then testator dies B. shall have the whole; for these cases seem to be within the plain intention of the testator. Ibid.

7. One by will devised thus; Item, I give and bequeath to my grand-daughter Mary Ford (the plaintiff) the sum of 40*l.* being part of a debt due and owing to me for rent from G. M. she allowing what charges shall be expended in getting the same. Item, I give unto my grandsons A. and B. the rest and residue of what is owing to me from the said G. M. which is about 40*l.* more, to be equally divided between them, they allowing charges as aforesaid. Afterwards the testator received the whole debt owing for rent from J. M. For the plaintiff it was insisted that there was a difference between a specifick and a pecuniary legacy; that though the disposing of a specifick might be an ademption of it yet this being a pecuniary legacy the paying the money to the testator would be a loss of it. On the other side it was insisted upon the difference between a voluntary and a compulsory payment; that though the first was no ademption, yet the second was, and that the testator obliged G. M. to pay in the money; but my Lord Chancellor was of opinion that there was no foundation for the difference taken in books between a voluntary and compulsory payment, for the latter might be with an intent to secure the legacy on all events, and decreed the plaintiff the 40*l.* legacy. Abr. Equ. Cases 302. Trin. 1728. Ford v. Fleming.

2 Wms's Rep. 469. pl. 149. S. C. and held by Ld. Chancellor that the testator's receiving the debt himself, though upon his suing for it, was no ademption of the legacy.

8. Where the testator devises a debt, and afterwards receives it, or even calls it in, in neither case is this an ademption of the legacy; seeing this might be done from an apprehension of such debt being in danger, and with a design to secure it, and being personal estate and not diminished by remaining in testator's coffer, instead of the hands of the debtor, it may well pass by the will. 3 Wms's Rep. 386. Mich. 1735. Ashton v. Ashton.

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9. A. devises 1000*l.* capital South Sea stock to B. At the time of making his will he had 1800*l.* of such stock, and after, by sale, reduced it to 200*l.* which he after increased to 1600*l.* and died. Between the making his will and his death the act took place, which changed three fourths of the capital South Sea stock into annuities; this legacy is not taken away or impaired by the sale, nor by the act of parliament. Cases in Equ. in Ld. Talbot's time, 226. Mich. 1736. Partridge v. Partridge.

(E. d) Legatees or Devisees-Joint.

Take How.

1. A Man devised to two and their heirs and died, and after the one of the devisees died, and the other survived, he shall not have the whole by survivor, but only a moiety, and the other jointenant the other moiety, for this was the intent of the devisor; per Audley Chancellor. Br. Devise, pl. 29. cites 30 H. 8. & Fitzh. Devise, pl. 11 & 20 accordingly.

2. A. seised of lands devised the same to his wife for life, the remainder to his three younger sons, and to the heirs of their bodies begotten, equally to be divided amongst them by even portions; and if one of them die, then the other two which survive shall be next heirs. The devisor dies, one of the sons dies. And by Dyer and Weston J. the three brothers were tenants in common in remainder, and although the words are, equally to be divided, the same is not intended of a division in fact and possession, but of the interest and title. 3 Le. 19. pl. 45. Pasch. 14 Eliz. C. B. Anon.

3. A man devised two parts of his lands to his four youngest sons in tail, and if the infant in ventre sa mere be a son, that he shall have the fifth part as co-heir with the four younger brothers, and if all five happen to die without issue male of their bodies, that the two parts shall revert to the next heirs of the devisor for ever. The father died, the son is born, and after he and three other of the said sons died without issue. All held that the survivor shall have estate tail in the intire two parts, and that none of the two parts shall revert till the five sons are dead without issue. Dy. 303. b. 304. a. pl. 49, 50. Mich. 14 Eliz. Anon.

4. H. devised a house to a woman, and to the brother of the woman, and to the heirs of every of their bodies, and for default of such issue, of the brother, and of the sister, the remainder to the right heirs of the devisor, and died; the brother died without issue, the sister had issue and died; the issue shall have a moiety, and no more, for it seems the word (every) made several estates. Quære if the right heir shall have in reversion or remainder? Dy. 326. pl. 1. Mich. 15 & 16 Eliz. Huntley's case.

And. 21,
22. pl. 44.
Huntley v.
Roper.
S. C. ad-
judged.—
Bendl. 26.
259. S. C.
and the
pleadings
and judg-
ment accordingly.—Raym. 455. Mich. 33 Car. 2. B. R. the S. C. cited by Raymond J. and observes, that though the question was, whether the intire house should go to the issue or only the moiety, and the other moiety to the heir of the devisor, yet he says, he finds no argument of it in the book, and that Dyer seems to intimate that the pleading of the case was more insisted upon than this point; and that Anderson says, that the stress of the case was upon the apportionment of rent.

[396] 5. If one devise his goods equally to two, there is no jointenancy; for (equally) shews his intention to give to each an equal proportion; per Popham. Cro. E. 696. Mich. 41 & 42 Eliz. B. R. in case of Lewen v. Cox.

6. A man

6. A man devises his lands to *his wife for her life, the remainder to A. B. and C. and their heirs respectively for ever.* The question was, whether A. B. and C. were jointenants or tenants in common? The court held, that here is a tenancy in common, and that it shall go throughout, and is not to be divided, and the intent of the deviser appears in the will, that every one shall have his part, and their heirs, so here is a provision made for children, and the word (respectively) would be idle, if another construction should be made, and would signify no more than what the law said without it. So judgment was given for the plaintiff, Nisi. Sti. 434, 435. Hill. 1654. B. R. Torret v. Frampton.

7. Where *money is given to two, (being personal estate) it shall be several to them.* 3 Ch. R. 214. Pasch, 1668. in case of Sanders v. Ballard.

8. Testator devised 50*l. per annum to A. and B. her son, payable out of such lands habend' for their lives and life of survivor, and adds, that after B. shall attain his age of thirteen years (A. his mother living) then B. shall have 20*l. annually of the said 50*l. for his better maintenance during the life of A. and after to have all as afore devised. Per Cur. This is a several rent and not a joint rent; for the entire 50*l. rent is devised to A. till B. is thirteen years old and then that B. shall have 20*l. of the 50*l. for his better maintenance, which clause would be absurd, if testator had intended it a joint-rent for if it was joint, then A. would have 25*l. and B. 25*l. and if the rent be construed joint, then it will be pro deteriori manutentionia. Sand. 284. Trin. 21 Car. 2. Duppa Executors of Baskervil v. Mayo.********

9. Where goods are devised to two jointly and *one of them dies before assent of the executor, the executor of him dying shall have his share, but if he dies after the assent of executor, then the survivor shall have the whole; because after assent of the executor an interest is vested and then the goods are become chattles governable by the common law, which makes them jointenants.* 2 Lev. 209. Mich. 29 Car. 2. Bastard v. Stukely.

2 Jo. 130.
S. C. —
2 Keb. 400.
&c. S. C.
—S. C.
cited by
the Master
of the Rolls
2 Wms's
Rep. 532.

Trin. 1729. in case of Cray v. Willis.

10. Where a devise was to *two equally, it was decreed by advice of Roll. Ch. J. that notwithstanding the word equally, the devisees were joint, yet the intention prevents the survivorship. See Vern. 32. pl. 30. Hill. 1681. in case of Thicknes v. Vernon.*

Vide tamen
1 Chan.
Cases 239.
in case of
Cox v.
Quaintock

where it was decreed that the administrator of one should have an account against the other, but it was much to the dissatisfaction of the bar.

11. Legacies are bequeathed to *A. B. and C. and the wife of C. equally to be divided among them share and share alike. C. was no kin to the testator, but C's wife was; per North Keeper, C. and his wife shall have only one third part, and the rather for that he observed the two (ands) viz. to A. B. and C. and W. his wife; and though a devise may be to ten persons and add an (and) between every person's name, yet it is not natural or usual to add an (and)*

till you come to the last person. Vern. 233. Pasch. 1684. Bricker v. Whalley.

[397] 12. A. devised *the surplus of his estate after his debts paid to B. and* C. B. dies; decreed by the delegates and per Ld. North and per Ld. Jefferies, that this is a joint devise and shall survive to C. Vern. 482. pl. 471. Mich. 1687. Shore v. Billingsley.

S. P. and though the executor had

assented to the legacy of the residuum by which it was insisted that a property was vested in the legatees by law, yet it was answered, that though that might be true with respect to specific legacies, yet in this case till it appeared that all the debts, &c. were paid, it would be impossible to know what the residuum was, and consequently no property could vest. The Master of the Rolls after taking time to consider of it decreed that the survivor take the whole in the same manner as if it had been a grant at law. 2 Wms's Rep. 347. Pasch. 1726. Webster v. Webster. — Ibid. 378. says the same decree was made 28 June 1729 by the Master of the Rolls in case of Cray v. Willis.

13. A man devised his lands *to his two daughters, equally to be divided between them, and to the heirs of the body of the survivor of them*; and the question was, whether they were jointenants or tenants in common; for (says the book) though if a devise be made to two equally to be divided between them, they shall be tenants in common, because in a will the intent of the deviser shall be interpreted to be so; yet it is not so in case of a grant or feoffment; but in a will it is a tenancy in common by construction and not by express words, but only by collection of the intent of the deviser; but if the other words of the will shew his intent to be stronger, that he intended a jointenancy, it shall be interpreted accordingly; and it was ruled accordingly, by reason of the express limitation made to the survivor. Ld. Raym. Rep. 630. Hill. 12 W. 3. per Holt, Ch. J. cites Sty. 211. Furze v. Weekes.

14. A. devised *a debt of 500l. to B. and C. and if either died, to the survivor*; B. died before the debt got in. Ld. Chancellor was of opinion, that B. having survived the testator, though he died before the debt was got in, was intitled to his share of the debt; but it was reversed in Domo Proc. 2 Vern. 654. Pasch. 1710. in case of Bretton v. Lethulier, cites it as the case of Davis v. Ld. Bindon.

15. One devises *the surplus of his personal estate to his four executors*; this is a joint bequest and on the death of one shall go to the survivors, as well in the case of a legacy as of a grant. 3 Wms's Rep. 115. Trin. 1731. Willing v. Baine.

(F. d) Legacies. In what Order to be paid.

Ibid. 37. pl. 101. S. C. cited in totidem verbis as Conie's case. —

3 Le. 55. pl. 80. S. C. cited in totidem verbis.

1. **L**EGACY to A. of 200l. to B. his second daughter 200l. to C. his eldest daughter 200l. By the better opinion of the court, *A. the youngest daughter should be first paid, and then B. and then C.* Cited by Barkham Serjeant. 2 Le. 55. in pl. 345. Mich. 15 Eliz. C. B. as Coniers's case.

2. When *several legacies* are given and *one is due*, but the rest not till afterwards, the executor may not pay the first the whole legacy, if there be *not assets* sufficient to pay the rest. Chan. Rep. 133. 15 Car. Vintner v. Pix.

S. C. cited Chan. Cases 149. Mich. 21 Car. 2. in case of Grove v.

Banfon, and Ld. Keeper declared; that where a legacy was secured, but not paid, he conceived that every legatee ought to lose in proportion there not being enough to pay all. — In the case of MAUIER v. FOTHERREY decreed that those legatees that were of age should receive their respective legacies, but should refund respectively, if the court thought fit to make all equal. N. C. R. 25. 10 Car.

3. Where legacies are to be made *up out of growing receipts* of a real estate, which proves not sufficient, and the executor has been over forward in paying any legacies he must bear the *deficiencies* out of his own purse; but the court saw no cause to allow the legatees *damages* for the same. Chan. Rep. 134. 15 Car. 1. Vintner v. Pix.

4. Devisee of lands in trust to pay mortgages in the first place, and then legacies, is made executor; he *mortgages* to raise money to pay other debts of the testator; such *new mortgage* shall take place of the legacies. Vern. 69. Mich. 1681. Brent v. Best.

5. *Charitable legacies* by the civil law are to be preferred to other legacies, and if the spiritual court gives such preference in case of deficiency of assets, Chancery will not grant an injunction. Vern. 230. pl. 226. Hill. 1683. Fielding v. Bond.

(G. d) Devise. When it vests, or is to be taken, or when Legacies are to be paid.

1. A Man devises to his wife the *demesnes of a manor for life and the services and chief rents thereof for fifteen years, and all the manor to another after the death of the wife*; though the *fifteen years expire*, yet the devisee shall take nothing but after the death of the feme. Agreed by all the justices. Mo. 7. pl. 24. Trin. 3 E. 6.

2. But if the will had been that after the fifteen years expired and the death of the feme the devisee should have all the manor after the fifteen years, then it should be construed distributively, viz. that the second devisee should have all the demesnes upon the wife's death, and the rents and services after the fifteen years expired. Arg. 1 Sand. 185, 186. Mich. 20 Car. 2. in case of Cook v. Gerard, cites S. C.

3. Devise to his son of goods *when he shall come to the age of 21 years, and if he die before the said age, then to one of his daughters*. The son dies before 21, the daughter shall have the goods immediately after the death of the son. And. 33. pl. 82. Mich. 4. E. 6. Anon.

So of money. 2 Vern. 283. Papworth v. Moore. — S. P. decreed contra

by Ld. C. King. But on mentioning the matter again the next day, and insisting that it had been determined as in the principal cases here of And. 33. and 2 Vern. 283. and distinguishing between those and the following case of 2 Vern. 199. that where the legacy is *devise*d over in case

of the legacies dying before 21, if he dies before it shall be paid presently, but if devised over, the executors or administrators of the legatee shall not have it till such time as the legatee, had he lived, would have been at the age; his lordship varied his decree, and the clause of the will being; that if any of his sons and daughters should die before him, her, or their respective ages of 21, then the legacy or legacies of him, her or them so dying should be paid to the survivor or survivors of such children, and two of the children having attained 21, and one dying at 11, and one other being no more than 12, his lordship decreed two thirds of the deceased child's legacy to be paid to the two of age, with interest from the other's death. And though it was objected that this being a new legacy the executors ought to have a year's time for payment, yet the court held that that must be intended to be from the death of the testator; whereas in this case the testator had been dead several years. 2 Wms's Rep. 478. *Laud v. Williams*.—The reporter adds a note, that the rule in equity seems by this resolution to be settled accordingly. *Ibid.* 481.

[399] 4. In replevin, &c. the defendant avowed, setting forth that G. D. was seised in fee of the manor of C. whereof the locus in quo, &c. was parcel, and being so seised, he gave the said manor to husband, and wife, and to the heirs of the husband, who by his last will devised a rent to the avowant of 4 l. out of the said manor, with a clause of distress for his livelihood and child's part, to be paid yearly; the husband died, and about 19 years after his death the wife died, and the avowant distrained for the arrears of his rent-charge incurred between the deaths of the husband and wife, and avowed for the same; thereupon the plaintiff demurred, and it was insisted for him, that this rent did not commence till after the death of the wife of the testator, and therefore the avowant could have no title, but to what incurred after her death; it was argued per Cur. that if he in reversion after the determination of an estate for life, grant a rent-charge to another, in such case the grantee may distrain for all the arrears after the grant, and which incurred in the life-time of the grantor, and it was said per counsel for the avowant that this was a stronger case, because it appears by the words of the will, that the rent was devised to the avowant, for his livelihood and child's part, which words imply a present advancement, and then the subsequent words, viz. to be paid yearly, are a strong proof that the testator intended it as such. 1 Le. 13. pl. 16. Mich. 25 & 26 Eliz. B. R. *Rearby v. Rearby*.

5. If a devise be of land to A. and his heirs after the death of such a monk, nothing passes to devisee till the death of the monk, but if land be devised to a monk for life, and afterwards to J. S. in fee, the devisee shall have the land presently. Le. 106. pl. 279. Mich. 31 & 32 Eliz. in the exchequer chamber, in *Ld. Paget's case*,
 So, if the devise be to the monk for 24 years; remainder after the same ended to J. S. in fee, J. S. shall take presently. *Ibid.* 198. cites 37 H. 6. 17.

6. Devise of 100 l. to his wife *pro exonerations of her dower*; this makes a condition that the wife shall not have the 100 l. till she makes a discharge of her dower. Cro. E. 274. pl. 3. Hill. 34 Eliz. C. B. *Pett v. Basenden*.

7. A bond for performance of covenants which are not broken, shall interrupt the payment of a legacy, unless the legatee will enter into a bond to the executor to make restitution, if, &c. otherwise not. Ow. 72. Trin. 37 Eliz. B. R. *Norton and Sharp v. Jennet*.

8. If

8. If land be devised in fee-simple, fee-tail, for term of life or years, the devisee may enter into the land devised without any leave of the executor or administrator; for the freehold or state is in the devisee before entry. Co. Litt. 111. a.

9. Devise of copyhold-lands to A. and B. his two sons, and to the heirs of their two bodies begotten, and wills that *each of them shall enter at the several ages of 21*, and that *his executors shall take the profits of the land till they come to their several ages of 21 years*. The eldest cannot take till the youngest comes of age; per three justices against Yelverton and Croke. 1 Bulst. 42, Mich. 8 Jac. Eylfe y. Chopley.

Cro. J. 259. Aylor, alias Aillet v. Chop alias Choppin. S. C. but per 4 J. against v. the eldest shall take

at 21, his part and possession, and yet the jointenancy shall hold place. — Yelv. 183. S. C. accordingly. For this * entry is only as to the perception of the profits, till the other is 21 also. — So where a term is devised to his two sons when they come to the age of 21 years, and that his executors shall take the profits in the interim; the eldest shall not wait for the age of the youngest. Per Croke J. 2 Bulst. 126. cites 13 H. 7. 17 b. or 15. b.

* The entry of him that comes to full age *does not destroy the jointure*, but they are jointenants notwithstanding. Yelv. 183. S. C. — S. C. cited Saund. 184. in case of Cook v. Gerard; as adjudged that the eldest may well enter though the other had not attained his age, because the words of the will shall be taken distributively reddendo singula singulis.

10. If a man devises *his trees to his executors to pay his debts*, the executors must cut down the wood in convenient time. Brownl. 32. [400]

11. A. has three sons, and devised several leases to his several sons *when they should come to the age of 21 years*, and that his executors should have the same in the interim. Each one of them when he comes to his age of 21 years shall have his term by such construction made, and reddendo singula singulis, and the eldest shall not tarry for his part till the youngest shall come to his age of 21 years, for each of them shall have his term in his turn. Per Croke J. cites 13 H. 7. 17. b. by Fineux. 2 Bulst. 126, 127. Mich. 11 Jac. Roberts v. Roberts.

12. A. devised land to B. for life, remainder to C. and his heirs, C. paying 100 l. out of the issues and profits of the lands. A. dies. C. dies, his heir within age. B. dies. And it being found by office that the land was holden by knight service in capite the king seized it, and afterwards for non-payment during the minority, the heir of A. enters after livery sued. But adjudged that the entry was not lawful, for being to be paid out of the rents and profits, it is to be intended when he shall receive them, but the king having taken the profits, he shall not pay them. Cro. J. 374. pl. 5. Mich. 12 Jac. B. R. Slade v. Thompson.

13. A. was possessed of a term for 32 years, and devised it to his wife for life, and after her death to his sons B. and C. jointly if they have no sons, and if they shall have sons, then that shall be reserved, and put out for the benefit of such child or children. But if it shall please God to send them no men children, then after their decease it shall descend and come to D. and E. children of a son-in-law. The wife died. B. died leaving a son; this son shall enter upon C. for it is an immediate devise to the children of B. and C. Per 3. J.

Cro. J. 394. pl. 7. S. C. resolved; and that the testator's care was rather for his grandchildren than his own child against

dren.— against Croke. 3 Bullst. 98. Mich. 13 Jac. Blandford v. Blandford. Mo. 846. pl. 1146. S. C. adjudged accordingly.

Cro. J. 655. 14. A. seised of three messuages has issue *three daughters A. B. and C.* and he devised *to each an house, and if his daughters die without issue, then to remain to J. S.* One dies without issue; quære if J. S. shall take it presently, or expect till all are dead without issue; per Houghton. Cro. J. 448. pl. 28. Mich. 15 Jac. B. R. in case of the King v. Rumball. the mother, and after divers arguments it was resolved that the mother should take immediately after the death of each, as they died without issue; but Lea Ch. J. doubted, because it was in a will; and that it was not the testator's intent to prefer the feme, as long as he had issue of his body. But for the reasons of the other justices they having long considered thereof, resolved that it could not be a cross-remainder. And so it was adjudged for the defendant.—S. C. cited Arg. 1 Sand. 184. in case of Cook v. Gerard.

Lev. 212. S. C. resolved accordingly.

15. A man being *seised of lands in fee in demesne, and also of a reversion dependant on the life of R. K. devises the demesnes to his wife for one year after his death, and then devises the said demesnes and the reversion together to W. K. habend. immediately from and after the expiration of that year, and the decease of the said R. K. to the said W. K. and his heirs.* The devisor dies. The year expires. W. K. shall have the demesnes presently, and the reversion after the death of R. K. for it shall be taken reddendo singula singulis. 1 Sand. 186. Mich. 20 Car. 2. Coke v. Gerard.

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16. A. bequeathed 100 l. *a-piece to his 4 daughters, (his only children) payable at 21 or days of marriage, and charged lands with payment of the same.* Three died. The survivor is intitled to the whole, but not to compel payment till she is 21 or married. Fin. R. 375. Trin. 30 Car. 2. Chapman (per Guardian) v. Crockley.

17. A. bequeathed 1500 l. *to B. and C. to be divided between them, and if one of them die, then the survivor to have 1000 l. and if both die, &c.* The time of payment not being mentioned, the legacies are payable in this case at 21 or day of marriage. Fin. R. 432. Mich. 31 Car. 2. Dormer v. Dormer.

2 Chan. R. 131. S. C.

18. A. devised to his two daughters 600 l. *a-piece to be paid at twenty-one, and the residue of his personal estate to his son, and declared that if either of his said children should die in their minority the survivors should be heirs in equal proportion, and made J. S. executor. The son died young.* The court thought the residuary part not subject to any contingency or survivorship, but that the interest thereof immediately vested in the surviving daughters, if of age or not. Fin. R. 436. Mich. 31 Car. 2. Bargrave v. Whitwicke & al.

2 Vern. 799. Anon. S. P. & S. C. cited and also the case of C'o-

19. Legacy to be *paid at sixteen years of age, legatee dies before; administrator of legatee shall not receive it till the sixteen years end.* 2 Chan. Rep. 188, 32 Car. 2. Sanders v. Earle.

berry v. Lampen.—A personal legacy shall be paid presently, though the child dies before the appointed time; per Ld. Wright Ch. Prec. 198. in case of Brewen v. Brewen.—Le 278. Hill,

Hill. 26 Eliz. B. R. it was said by Dr. Awbrey, that the civil law is, that the executor or administrator shall receive it presently. In Lady Lodg's case.

20. If a legacy be given to an infant to be paid at his age of twenty-one years, and the executors to pay interest for it until it becomes payable; if the infant dies before twenty-one, it is due presently to the executor or administrator of the infant; but if no interest was to be paid for it, then it shall not be paid until such time as the infant would have come to twenty-one in case he had lived; because there it is a benefit the testator intended to the executor by keeping it in his hands; but in the other case it would be none, when interest was payable, 2 Freem. Rep. 64, pl. 74. Hill. 1680. Anon.

A. bequeathed to J. S. 1000 l. payable at twenty-one and in the mean time J. S. to have the yearly sum of 20 l. not amounting to the interest

of the legacy given him. J. S. died before twenty-one; it was held by Raymond Ch. J. Jekyl Master of the Rolls, and Eyre Ch. J. (at the council, it being a case from Antegoa) after time taken to consider of it, that the executors of J. S. should wait for their legacy till such time as J. S. had he lived would have been twenty-one, it being unreasonable that the executors of J. S. standing in his place should be in a better case than J. S. himself would have been, had he been living, and it was to be presumed that A. had made a computation of his estate and considered when the same would bear and allow of the payment of this legacy, and that no reason could be given why an uncertain accident should accelerate the payment of this legacy before the time, which was at first intended for that purpose. 2 Wms's Rep. 335. 337. pl. 96. Hill. 1725. Chester v. Painter.

21. Though it be said that the money shall be laid out after all legacies paid, yet all besides what serves to pay the legacies should be laid out presently. 2 Vent. 346. Trin. 32 Car. 2. Anon.

22. Lands devised to J. S. in fee in trust for A. and the heirs of her body, and if A. died without issue to B. for life, and in another clause in the will he devised that if A. die without issue and B. be then deceased, then and not otherwise he gave the land to R. and his heirs; A. died without issue. B. survived her and died; R. brought a bill against J. S. and the heir at law of the testator to have this trust executed; decreed for R. though B. survived A. because the words (if B. be then deceased) seemed put in to express his meaning that B. should be sure to have it for her life and that R. should not have it till she were dead, and also to shew when R. should have it in possession. 2 Vent. 363. Hill. 2 & 3 W. & M. in C. B. Anon.

23. A devise was in such manner, &c. because my debts are many, amounting to 4600 l. a perfect schedule whereof is hereto annexed, therefore I devise my lands to be sold, &c. And in another clause says, as concerning such and such lands, after my just debts and legacies paid, I devise them to A. &c. Afterwards the deviser mortgages part of these lands for 4600 l. The debts (in the schedule) and the legacies are paid, and now the estate shall vest; for the debts to be paid precedent thereto are the debts mentioned in the schedule. 3 Lev. 432, 433. Mich. 7 W. 3. C. B. Loddington v. Kime.

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24. A portion was devised to a daughter to be raised out of a real and personal estate and to be paid at twenty-one, she marries and dies before twenty-one leaving a child; (Note, it was not said to be paid at twenty-one or marriage) Ld. Sommers directed

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an account of the estate and then he would give his opinion, but inclined strongly that the portion was payable; for all the cases go upon this, there being no marriage that did not happen, which was the cause of the portion. Ch. Prec. 109. Hill. 1699. Jackson v. Farrant.

25. J. S. having three daughters and several grandchildren and great grandchildren made his will, and devised the *surplus* of his estate to be equally divided amongst his three daughters, and all his grandchildren and great grandchildren, *that should be living within two years after his death*, and died; and within two years after his death other grandchildren were born; the plaintiffs examined witnesses to prove J. S.'s intent, that none born after his death should take; and the question was, whether they could be admitted to read this proof; and my Lord Keeper was of opinion, that such proof might be admitted; so the witnesses were read; but *depositions were only, that J. S. said so or so, or to that effect*, which my Lord said, signified nothing for that makes the witness the judge; and he *ought to set down the very words for the court to judge of*; but without this proof, my Lord held, that the words in the will (*within two years after my death*) were to be taken restrictively, and *extended to none born after*; and decreed accordingly, which decree was affirmed in the House of Lords. Abr. Equ. Cases 231. Trin. 1700. Dayrell v. Moleworth.

26. Devise of 500 l. to A. *to place him out apprentice*; it was objected that A. was not intitled till fit to be placed out, but the objection not allowed and the legacy decreed to be paid. 2 Vern. 431. pl. 393. Hill. 1701. Nevill v. Nevill.

27. A. by marriage settlement secures 2000 l. *a-piece to daughters, payable at eighteen or marriage*, and afterwards by will directs the portions to be made up. 3000 l. *a-piece*. Per. Ld. Wright and the Master of the Rolls, no time being mentioned for the payment of the additional portions they are payable at the same time with the portions provided by the settlement which was at eighteen or marriage. Ch. Prec. 226. pl. 186. Trin. 1703. Ashton v. Ashton.

28. A. devised 300 l. to B. but declares his will and desire that B. give the 300 l. to M. the daughter of B. at his death or sooner, if there be occasion for her better advancement. It was insisted that if there was occasion M. might call for the 300 l. even in B's life-time. 2. Vern. 466. pl. 427. Mich. 1704. Eagles v. England.

29. John Jackson by his will gives certain lands to be sold for the payment of his debts, and the residue he gives to his wife Mary for life, and after her death to Thomas his son, his heirs and assigns for ever, provided nevertheless, that if the said Thomas should depart this life without issue of his body, then he gave to his two god-daughters the plaintiffs 200 l. to be equally divided between them, and paid out of the estate last mentioned within six months after the decease of the survivor of his said wife and his son Thomas by such person as should inherit.

inherit or enjoy the same, and for non-payment thereof he gave the estate to his said god-daughters for payment thereof. The testator dies and his widow dies, Thomas enters upon the last mentioned lands and levies a fine, and settles the land upon his wife for a jointure, and his heirs by her, and for want of such issue to his own right heirs, and he having one child a daughter by that marriage, he by his will gives the estate to his wife Sarah and her heirs after the death of his said daughter, and shortly after the making this will he dies, leaving his wife and one daughter living, and in about three months after the daughter dies, and Sarah the widow having the land for her life by the settlement and the inheritance thereof by the will of Thomas, she afterwards marries the defendant by whom she had children, and then she dies, and the defendant enjoys the land by the curtesy of England. The plaintiffs brought a bill against the defendant for a satisfaction of the 200 l. which cause came to hearing and the question was whether the legacy was payable by reason Thomas left issue living at his death, or whether it did not become payable at any time upon the failure of issue of Thomas. My Ld. Keeper Harcourt was of opinion that the legacy was not payable, taking the meaning of the words of the will to be, that if Thomas should have no issue living at his death, then to be paid only; for that the testator having limited it to be paid in six months after the death of the survivor, which if should be interpreted to be paid upon the failure of issue of Thomas that might be many years after, but told the plaintiffs that as the estate was devised for payment of the debts, they might and should have the liberty to bring an ejectment and try it and would retain the bill in the mean time. An ejectment was brought to try it at the assizes, but the plaintiff would not proceed. N. B. This decree was afterwards reversed in the House of Lords. MS. Rep. Pasch. 11 Ann. in Canc. Nicholls & al' v. Hooper.

30. Devise of land to A. in tail and after A's death without issue to B. A. dies living the testator, but left issue. The devise to A. is void and B. shall take immediately, though Cowper C. said, it was against the intent of testator and the words of the will, and against a maxim in law; that an heir shall not be disinherited without express words. 2 Vern. 722. pl. 640. Mich. 1716. Hutton v. Simpson.

Chan. Prec.
439. pl.
285. Simp-
son v.
Hornby.
S. C. &
S. P. ac-
cordingly.
—Gilb.
Equ. Rep.

115. S. C. in totidem verbis.

31. A devise was in trust that the devisees shall have the profits of the land when they come of age; they have a right to it in their minority, at least to so much thereof as may be sufficient for their support and maintenance, and what is not then paid shall go to their administrators. 9 Mod. 104. Mich. 11 Geo. Bateman v. Roach.

32. I give all my personal estate to my wife, and to both my grand children 1000 l. a-piece, if they arrive at the age of twenty-one years or marriage. These legacies are payable at twenty-one or marriage and

Confirmed
on appeal
to the House
of Lords.
Ibid.

and is not to wait the death of the wife. 9 Mod. 93. Pasch. 10 Geo. 1. Canc. *Burdet v. Young*.

Cases in Chan. in Ld. King's time. 15. s. C. and says, the court was of opinion, it should be paid when the deceased would have received it; because else would be so many several divisions of it as

33. A. by will *charges lands with payment of 1000 l. a-piece to D. E. and F. his daughters, payable at 22 or marriage; and if any die before her portion becomes payable, the share of her so dying to go to the survivors*. E. died before 22 or marriage; D. attained her age of 22. It was held by Lords Commissioners Jekyl and Gilbert, that E's share shall not be paid to the surviving daughters till such time as such deceased * daughter, had she lived, would have come to 22. 2 Wms's Rep. 271. Pasch. 1725. Feltham v. Feltham.

34. *And* (the reporter says that as he understood) the court also declared that the surviving daughters should not have their shares of E's part until they respectively should have attained 22 or be married, it not being the testator's intention to trust any of them with their portion till 22 or marriage. *Ibid*. 272.

each person's title to it accrued, whereas it was designed to be one intire payment. If a legatee dies, his executors or administrators shall not receive the legacy before the deceased himself might have done it; for it is absurd that an accident of death of a legatee should vary a time of payment appointed by another person; and this is particularly strong, being to charge a real estate. The deviser might perhaps have made a computation, and considered how, and at what time his estate would bear such a charge; and if the part of the deceased should be paid at the time that the survivor's portion was payable, it might be charging the estate sooner than the deviser intended it should.

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MS. Rep. 9 July, 1728 *Landy v. Williams*.

35. A. by will gives a legacy to his son B. at 21, and if he died before, then to go over to C. and D. (two other children) *testator dies; and B. dies before 21*. And bill is now brought by C. and D. (who are likewise infants) for this legacy.

And the question was, whether this legacy should wait till B. would have been 21 (if he had lived) or should be paid immediately?

Lord Chancellor at the first hearing declared, that if this had been a substantive vested legacy, and no clause of survivorship or limitation over, it must, according to the late authorities, have waited till B. the legatee would have been 21, and would not have been recovered sooner by the executors, because that would be to accelerate the payment sooner than the donor intended it, and it seems here C. and D. are substituted only in the place of the executors, &c. of the legatee.

Lord Chancellor thought that though the legacy here is given to B. at 21, yet it is a vested legacy, and the same as if it had been given to be paid at 21; all the legacies to the other children being given in that manner, and this small varying of the expression does not sufficiently shew that the testator intended any difference.

But nota, and it seems this point is not material to the main question as to the time of payment over; for whether vested or not, it was plainly to go over upon the legatee's dying before 21, which happened.

Next day this was stirred again, and Mr. Solicitor General pro Quer. cited 2 Vent. 347. Leon. 278. and argued that the difference was

was between an executor and a devisee over; for that in case of such a legacy vested, and the legatee died before 21, there the executor should wait, and not be paid the legacy till the legatee would have been 21, if he had lived; because the executor claiming under the legatee can be in no better a condition than the legatee himself would have been, &c. And that the executor should thus expect, and was lately resolved in a plantation clause before the Lords of the council upon a reference to the two Chief Justices and Master of the Rolls; but it is otherwise in case of a devise over, for the devisee over does not claim or come in under the legatee, but his right accrues immediately upon the contingency happening, viz. death of the first legatee before 21.

Nota, at another day Lord Chancellor declared, that though he could see no real difference between the devisee over and the executor or administrator, yet as there was a modern precedent to the contrary, and that the devisee over should be paid presently, and that the executor should wait, &c. he thought he was bound by that precedent.

And further said, that so long ago as the time of E. 6. in And. Rep. such a devisee over maintained an action, &c. [405]

And 25 July his lordship gave judgment for the plaintiffs that the legacy should be paid immediately, without waiting till B. should have been 21. And cited PAPWORTH AND MOOR 2 Vern. 283. (which is in point) and 1 And. 33. MS. Rep. 9 July, 1728. Landy v. Williams.

36. Lord Dover by his will dated 14 January 1707. devised *several houses, ground-rents, &c. both in possession and reversion to Folkes & al'. upon trust, that they and the survivor of them should (as soon as conveniently they might or could) sell and dispose of all the said houses and premises to them devised both in possession and reversion for the best price could be gotten for the same, and out of the money arising by such sale or by the rents and profits in the mean time, should pay several legacies thereby given to several persons, which are directed to be paid within six months after his death, and after payment of the said legacies and reimbursing the said trustees their charges, to put all the remainder of the monies to be raised by the sale of the premises into five equal parts or shares, and out of the first fifth part to pay unto the four youngest daughters of his niece Lady D'Avers 1000 l. a-piece, at their respective ages of 21 or days of marriage, which should first happen, and to pay the residue of the said fifth part to the proper hands of Lady D'Avers, or as she should direct, for her own proper use, and her receipt alone to be sufficient for the same; and to pay another fifth part to his niece the Lady D'Ewes after payment thereof of 1000 l. a-piece to her younger children, in like manner, and to pay the three other fifths to his three other nieces in like manner; and if any of his said nieces should happen to die before any dividend could be made of the sum or sums of money to be raised by the sale or sales of the houses and premises directed to be sold, he appoints that all and every the sum and sums of money which should or ought to have come and been paid to his said nieces in case they had lived, should,*

MS. Rep.
Trin. 3 Geo.
2. in Canc.
D'Avers &
al' v. Folkes
& al'. and
Helmcs v.
D'Avers.

should, in such case of their dying be paid by his trustees to and amongst all and every the younger children of his said nieces, sons, and daughters, in equal proportions, which should be alive at the time the dividends are or ought to be made by the intent of this his will, the sums so to be divided to be paid as soon as they are raised; in which distribution of the sums of money intended for his said nieces, care is to be taken that the younger children of his said nieces do only claim and take the share and part intended for their own mother in case they had lived, and no more; and that after so much money was raised as would pay the legacies given by him which were precedent in point of payment to the legacies intended for his nieces and their children, that then and so often as 1000l. was raised by virtue of the trust aforesaid, that the said money should from time to time be put out at interest upon land security by his trustees or the survivor of them, and the monies which arise and come from the interest thereof should be added to the principal to the increase of the sums intended for his said nieces, and their children respectively.

Lord Dover died 5th April 1708. Lady D'Ewes; one of his five nieces died soon after in the beginning of February 1708 before any sale made or bill brought for execution of the trust, leaving two sons and four daughters, scil'. Sir Jermin D'Ewes, Willoughby D'Ewes, Delariviere, Mary, Henrietta, and Merelina, all infants.

[406] Soon after the death of Lady D'Ewes in Hill. Term 1708. Sir Robert D'Avers and Dame Mary Ux'. one of the nieces of Lord Dover, and all her younger children then living, together with the younger children of Lady D'Ewes and others, exhibited their bill in this court against the trustees to have the trust estate sold, and that the money arising thereby might be divided according to the directions of the will. The cause was heard 28th July 1709, and it was decreed that the estate devised to be sold should be sold to the best purchaser to be allowed of by the master, and that the money arising by such sale should be divided and paid in such manner, and to such persons, and subject to such contingencies as the will directs. Pursuant to the said decree several parts of the trust estate were sold, and the several legacies by the will given and directed to be paid in six months, as also the several legacies of 1000l. a-piece given to the daughters of the testator's nieces were likewise all paid.

Lady D'Avers died 18th October 1722, intestate, leaving eight children, scil'. three sons and five daughters, a great part of the trust estate still remaining unsold. The younger children of Lady Davers in Easter term 1726, exhibited their bill against Folkes the surviving trustee, and the younger children of the other nieces of the testator, to revive the former suit and proceedings, and this came on to be heard 9th June 1727, and it was then decreed that it be referred to the Master to take an account of the several contracts made for the sale of the trust estate pursuant to the former decree since the death of Lady D'Avers, and of the times when such contracts

contracts were made, and for what sums respectively, and what younger children of Lady D'Avers and Lady D'Ewes respectively were alive at the time of making the contracts for such sales, and that one fifth part of the money arising by such contracts respectively be paid to the younger children of the said Lady D'Avers, who were living at the time of making such contracts, and if any of them are since dead, to their representatives; and that one other fifth part of the monies arising by such contracts respectively to be paid to the younger children of Lady D'Ewes who were then living, and if any of them are since dead, to their representatives, and that the trust estate remaining unfold be forthwith sold according to the former decree, and that one fifth part of the monies arising thereby be paid equally to the younger children of Lady D'Avers as shall be living at the time of such sale, and that one other fifth part be paid to the defendant Delariviere Gage, Mary Talburgh, and Henrietta H , younger children of the said Lady D'Ewes, or to such of them as shall be living at the time of such sale, the other fifths arising by such sale be paid according to the will of Lord Dover.

Mr. Helmes married Merelina D'Ewes, one of the daughters of Lady D'Ewes; she attained her age of 21 years on 6th of July 1721, and died in April 1725, leaving issue one son, and Mr. Helmes took out administration to her. Mr. Helmes thinking himself aggrieved by the said decree, petitioned to have the cause reheard, and insisted, that his wife's right was a vested interest by the death of her mother Lady D'Ewes, and that he in right and as representative of his said wife is intitled by virtue of the will and former decree to his wife's proportion of her mother's share of the monies arising and to arise by sale of the trust estate.

This cause was afterwards solemnly argued by counsel on both sides, before King C. assisted by Raymond Ch. J. and Mr. Baron Comyns.

The question did arise on the clause of survivorship in the will, scil'. If any of my said nieces shall happen to die before any dividend can be made of the sum or sums of money to be raised by the sale or sales of the houses and premisses directed to be sold, I appoint that all and every the sum and sums of money which should or ought to have come and been paid to my said nieces in case they had lived, shall, in such case of their dying, be paid by my said trustees to and amongst all and every the younger children of my said nieces, sons and daughters, in equal proportions, which shall be alive at the time the dividends are or ought to be made by the intent of this my will, and the sums so to be divided to be paid as soon as they are raised.

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Resolutio curiæ. Mr. Baron Comyns. Though the question arises upon the clause of survivorship, yet the whole will ought to be taken into consideration. Ld. Dover directs the trust estate both in possession and reversion to be sold so soon as conveniently it might or could; so it is plain he intended the reversion should be

fold, and not to defer the sale till it came into possession, which did not happen till the death of Lady Dover, who died in 1726, and though it may be difficult to tie up the sale to any precise and certain time, no certain time being fixed by the testator, yet the court must fix some reasonable time or other for the sale, or set some bounds to the trustees for sale, which they ought not to exceed, and I think the utmost period of the time for the sale cannot exceed the time that the daughters of his nieces Lady D'Avers and Lady D'Ewes should marry or attain their age of 21 years; for then their several legacies of 1000 l. a-piece grow due to be paid out of their mothers shares. If it were discretionary in the trustees not to sell till they thought fit, by delaying the sale they might totally frustrate the will and not sell at all. The children are to take who shall be alive at the time the dividends are, or ought to be made; by the intent of this will there is certainly a difference between the words are and ought, and the testator meant some difference between them, and therefore not necessary that the younger children should be alive at the time the dividends were actually made, it is enough if they be living at the time they ought to be made; and I think the estate ought to have been sold sooner, and consequently the dividends ought to have been made sooner, for they are directed to be made as soon as the money raised by sale.

I think Mrs. Helmes being of age before her death, and a party to the bill in 1708 for an execution of the trusts in Lord Dover's will, by that bill she put in her claim to her share of her mother's share under the will, and that an interest was vested in her, and consequently Mr. Helmes, as her representative, is intitled to her share.

Raymond Ch. J. said the will was dark and obscure, but thought the testator intended the trust estate both in possession and reversion should be sold in a reasonable time, and such time was long since lapsed and past, and did not think it necessary in the present case to determine, or fix any precise or determinate point of time, he was sure a reasonable time was already past. Whensoever the sale ought to have been made, by the intent of the testator, that was the time the dividends ought to have been made, and from that time became a vested interest in the younger children of the testator's nieces.

King C. of the same opinion, that the interest attached in the younger children at the time the trust estate ought to have been sold, by the intent of the testator.

Decreed that the monies raised, or to be raised by the sale of the trust estate to be equally divided between the younger children of Lady D'Avers and Lady D'Ewes respectively, or their representatives, pursuant to the directions of the will; per Cur. MS. Rep. post Trin. 3 Geo. 2. in Canc. Davers & al' v. Folkes & al' and Helmes v. D'Avers.

(H. d) Devise. When to be taken, where the Estate is limited upon a Dis-junctive.

1. **D**ÉVISE was to N. his grand-child, with a proviso, that if N. died before payment of 500 l. or before he come to the age of 30 years, that then O. another grand-son, shall have it. N. died before such age. Adjudged that O. shall have it as a purchaser. 2 Roll. Rep. 220. Per Chamberlaine J. cites 9 Eliz. Oclie's case.

2. A. devised land to his son, but if the son die before 21 or without issue, he gave and devised the premises to J. S. It was adjudged upon a special verdict, that if the son die before 21, though he leaves issue, yet the issue shall not take, but the remainder-man. Cited 2 Vern. 377. pl. 340. Trin. 1700. in the case of the bioph of Oxford v. Leighton, as adjudged on a special verdict in the case of Jennings v. Helliar.

Mo. 422.
contra.
Sewell v.
Garret.
Cro. E.
525. Saul
v. Gerard.
Contra.
But Cro. E.
was denied

to be law, per Holt Ch. J. 12 Mod. 277, in case of Hilliard v. Jennings

(I. d) Legacies to Infants.

When to be paid.

1. **L**EGACIES were directed to be paid *within one year after testator's death*. But the legatees being infants, executor refused payment, unless indemnified by this court, the infants being incapable of giving discharges. Decreed that a *master place the money out*, or continue it where it now is, as he shall approve, and *the renewed securities to be in the name of the guardian, or such other as the Master shall think fit*; and the executor to be indemnified. Fin. R. 94. Hill. 25 Car. 2. Dyke v. Dyke.

Defendant
said he was
always
ready to
pay it, he
being in-
demnified,
and insisted
to pay it
without in-
terest, and

it was decreed accordingly, and the defendant to be indemnified. Fin. R. 264. Trin. 28 Car. 2. Bullen v. Allen.

(K. d) In what Cases a Legacy must be demanded.

1. **L**AND was devised to A so that he pay, &c. The payment ought to be upon request and subsequent. Arg. Mo. 363. cites 38 E. 3. fol. 11 and 12. and cites 4 E. 6. Br. Estates. 78.

2. Testator having made a deed in which several annual rents were expressed, afterwards by his will devised such rents as are mentioned

Ibid. cites
14 E. 4. and
22 H. 6.

tioned in such deed, according to the meaning of the said deed, to his younger children, and if his heir does not pay them, then he willed his lands should be to his younger children during their lives. It was held that this devise referring to a deed, is a good devise in writing, as if the rent-charges were expressly mentioned in the will, and that these being *rent-charges* by the will, and the condition being to pay them according to the intent of the deed, must be demanded, for it is payable in nature of a rent, and not as a collateral sum. Cro. J. 145. pl. 4. Hill. 4 Jac. B. R. Molineux v. Molineux.

Poph. 104. 3. Legacy is a thing in its nature not to be paid without *de-*
in Slings' *mand.* 3 Mod. 30. Mich. 35 Car. 2. B. R. Arg. in case of Malloon
case. v. Fitzgerald.

And though a bond be given for performance of the will, yet a request is to be made. Le. 17. pl. 20. Pasch. 26 Eliz. B. R. Fringe v. Lewes. Arg. if a man be bound to perform covenants, and one covenant is to pay legacies, there he need not pay them without a demand. But where one is expressly bound to pay such a legacy, there he must pay it at his peril. 2 Le. 114. pl. 152. Trin. 37. Eliz. B. R. in case of Wellcock v. Hammond. Yet a release of all actions and demands is no discharge of a legacy, but it must be released by particular words. 3 Mod. 279. Pasch. 2 W. and M. in B. R. Per. Cur. in case of Cole v. Knight. If the will directs that on non-payment the legatee may enter and enjoy the profits of such and such land till satisfied, no demand is necessary, for it is no forfeiture, but an executory devise, though time and place are appointed for payment. Ruled per Pemberton Ch. J. at the Assises. 2. Show. 185. pl. 190. Hill. 33 and 34 Car. 2. B. R. Peirson v. Sorrel.

A. devised land to D. on condition to pay his four daughters at their full age to every one of them 20 l. The condition is not broken without a demand of those sums after their full age; for D. is not bound to take notice of their full age, but after notice he ought to pay. Cro. J. 57. Curtis v. Wolverston.

(L. d) Legacy to Infants, &c.

Payment to Whom is good.

1. THE executor refusing to pay *infants legacies to their father*, a suit was brought by the father in the spiritual court, and he had sentence there. The executor moved for a prohibition, and alleged that he was executor, and chargeable in an account for the money. But being *after sentence for the father* in the spiritual court, and also before the delegates, a prohibition was denied; and also because *executor refused to give security* for payment of the legacies to the children. Godb. 243. Hill. 11 Jac. C. B. Ayliff v. Brown.

2. A legacy of 10 l. was bequeathed to *feme covert* to be paid 18 months after the death of deviser; *feme dies within the 18 months*; administration belongs to the baron, and not to the daughter of the feme; for the baron had an interest in it before the time of payment accrued, the which interest it is clear he might have released before the time of payment accrued. Per Mountague 2 Roll. R. 134. Mich. 17 Jac. B. R. Anon.

A purchaser was ordered to

3. Executor pays a child's legacy of 125 l. to the father, and takes bond from the father to save him harmless. The father failed; the child

child comes of age. Decreed the executor to pay the legatee (but this was of the bond taken) and by the attorney general the executor should have taken security to repay it to the infant, or sued in chancery to have it paid; but per Lord Keeper it may be so where a legacy will bear a charge of suit, but not else. Chan. Cases. 145. Hill. 26 and 27 Car. 2. Holloway v. Collins.

master, and thereon the purchaser to be discharged of it. 2 Chan. Cases 79. Mich. 33 Car. 2. North v. Champenoon.

pay children's legacies to their parents on their security, which was to be allowed by a

4. A personal legacy given to an infant is more properly cognizable in chancery than in the spiritual court, and the executor applying to the chancery, that court ordered the money to be put out for the children, and not to be paid to the father, who refused to give the executor security, but sued for the money. Vern. R. 26. Hill. 1681. Horrel v. Waldron.

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5. Legacy bequeathed to *feme covert*; payment to her alone is not good. Vern. R. 261. Mich. 1681. Per North K. Palmer v. Trevor.

6. A. bequeathed 50l. a-piece to B. C. and D. the children of E. the money was paid during their minority to E. the father on his giving security to the court; B. C. and D. outlived their age several years, and made no demand of their money, yet they shall be paid with interest and costs, nor shall there be any deduction for maintenance of them in their minority, the father was bound to do it, and their portions given by a stranger are nothing to him more than if they had not any; and for the interest of them, they having served their father, their service was more worth. Per Cowp. C. 3 Chan. R. 165. Pasch. 7 Ann. Strickland v. Hudson.

7. Ld. C. Cowper said, that the Master of the Rolls who had longer experience than himself, would never allow a child's legacy to be paid to the father or mother upon any security whatever, by reason of the strife it might occasion in a family. 3 Ch. R. 168. Pasch. 7 Ann. in the case of Strickland v. Hudson.

8. The executor paid an infant's legacy to his father, who at the infant's full age promised him payment of a double sum at a future time, but said he could not pay him then. He and the son became co-partners in trade, and 14 years after the son's full age became bankrupts. Decreed that the executor pay the money to the plaintiff the assignee of the commission, and though this was thought a hard case by Lord Cowper himself, yet he said he did it to deter others from paying infant's legacies to parents. G. Equ. R. 103. Trin. 1 Geo. 1. Dawley v. Ballfrej.

Abr. Equ. Cases, 300, 301. Dayley v. Tollferry. S. C.

This case was thought hard, and the more so it being proved that the testator

on his death bed gave directions that the executor should pay the legacy to the father to improve the money for the infant's benefit, and that this circumstance appears likewise in the register-book. Wms's Rep. 285. Mich. 1723. Dayley v. Tollferry.

(M. d) Payment or Taking. How. Clear of Deductions.

1. **A.** *Seised in fee of lands in Ireland by will made in England devised those lands to a trustee (who as also the testator and his wife lived in England) for payment of 80l. a year annuity to his wife for life.* No place was appointed where the money should be paid. It was insisted that 80l. a year payable in Ireland was not equal to 80l. a year payable in England, and therefore the charge of remitting should be deducted. But Ld. C. Macclesfield decreed otherwise by reason of the circumstances before mentioned, and also in regard it appeared in the proofs that testator had made leases of part of his Irish estate, reserving just so much rent to be paid in London, free from taxes, as would be sufficient to pay all the annuities given by the will. And plaintiff was ordered her costs. 2 Wms's Rep. 88. Hill. 1722. Wallis v. Brightwell.

[411] 2. *So if one by will made in England gives a legacy of 80l. it must be intended English money, and it will be intended the same thing though charged on land in Ireland, and the reason is the same of both.* Per Ld. C. Macclesfield. 2 Wms's Rep. 89. Hill. 1722. in case of Wallis v. Brightwell.

MS. Rep. Mich. 1727. Green v. Marygold. 3. *A. by will in 1677. devised certain lands of 62l. per annum to trustees, to pay out of the rents and profits 30l. per annum to his wife for her life, without any deductions in satisfaction for her dower.* And question was whether there was to be an allowance for the land-tax or not?

For the plaintiff who demanded the annuity it was insisted by the Solicitor General & al' that the land-tax was a deduction, that there was an ample fund, and that this was a bounty intended by the husband, &c.

Contra for defendant, it was insisted that this devise was to be considered as a rent charge to the wife, and as all such rents are charged by the land tax act, so ought this, &c. and the saving in the statute of covenants and agreements between landlords and tenants does not extend to this case.

And per Master of the Rolls accordingly, and said he was sensible that the act would be a repeal of any covenant to pay clear of taxes, unless there had been such saving; but here this is by way of devise and not covenant, and therefore the saving does not extend to it, and the act being a repeal or discharge of the obligation to pay without taxes, there is nothing to take it out of the general purview of the act; and that if a devise be of a rent-charge clear of all taxes by express words, it will be subject nevertheless by the act, because there is no saving as in case of covenants, &c. But here the words of exemption are not so strong, it is not said clear of taxes or without taxes, but without any deductions, so that testator seems not to have had the case of taxes under his consideration, but deductions of other kinds, and there is no reason why the testator, if he had intended it to be clear of taxes, should not have mentioned the word taxes, since if no land-tax was then actually in being, it

It was a kind of tax that had been before and was well-known. That every land-tax is a new grant to which all the parties, and thereby is a liberty to deduct out of all rent-charges and annuities, wherefore, &c.

Nota, In this case as the party had paid the annuity without deducting the tax, the court would not go back to make the party refund, nor was it so much as prayed.

(N. d) Interest. In what Cases payable, and from what Time.

1. **I**F 100l. be bequeathed to be paid divers years after testator's death, this *difference* is to be observed; if the *day were given in favour of the legatee* being an infant, who could not safely receive it any sooner, then he shall have the profit. But if the residue was *in favour of the executor*, then the legatee shall have the 100l. only. Went. Off. Executors 252, 253. cited Sum. Silv. 284.

2. *Infant brings bill per prochein amy for 100l. legacy devised to him.* Decreed to be paid, but without interest. Fin. R. 264. Trin. 28 Car. 2. Bullen v. Allen.

3. In case of a legacy, it was admitted it was not due till demand, and the executor or administrator should pay interest but *from the time of the demand*; et semble, that if no demand be proved in the cause, it will be *from the time of the bill exhibited*. 2 Freem. Rep. 1. Pasch. 1676. Anon.

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4. J. S. made his will, (his wife being then with child) and ordered that all his personal estate after his debts and legacies paid, should be laid out in land (in case he had no son) and be settled on his brother for preservation of his name, and devised that if the wife were delivered of a daughter, that she should have 3000l. paid her at her day of marriage, and also devised that the mother should have, 80l. part of the interest of the 3000l. for the education of the daughter. * J. S. dies, the wife has a daughter. Per Cur. There is nothing to be laid out till the debts and legacies paid; the 80l. is not to the daughter but for the mother; it is taken for granted that *where a sum of money is devised to a child at such an age, it shall have the interest in the mean time rather than the executor shall swallow it*; but clear, where *no maintenance is otherwise provided for it*, and decreed per Ld. Chancellor, that the executor should account for what interest he paid the brother. Note though it be said, that the money to be laid out after all legacies paid, yet all besides what serves to pay the legacies should be laid out presently. 2 Vent. 346. Trin. 31 Car. 2. Anon.

* But if such daughter die before 21 or marriage, her portion and all monies so devised to her were to be employed for the benefit of such as were to enjoy his Lands. The surplus of the interest of the 3000l. over and above the 80l. was paid by the executor to the brother for

several years, and on the executor's stopping payment, the brother brought a bill to recover the same, insisting that *all the rest of his personal estate* being to be laid out in land, this either expressly, or by a necessary implication included all the interest of the 3000l. over and above the 80l. a year. But Ld. C. Finch who blamed the plaintiff's suit as unkind, &c. decreed the plaintiff the (brother) to re-pay what he had received, and that the trustees should pay the interest over and above the 80l. a year for the benefit of the daughter, till 21 or marriage. Wms's Rep. 786. cites

S. C. as there taken from the register, and by the name of *Bourne v. Tynte*.——S. C. cited per the Master of the Rolls. 2 Wms's Rep. 22 Pasch. 1722. by the name of *Brown v. Tynte*.

If one gives a legacy charged upon land which yields rents and profits, and there is no time for payment mentioned in the will, the legacy shall carry interest from the testator's death, because the land yields profit from the time, per *Ld. C. Macclesfield*. Trin. 1722. 2 Wms's Rep. 26. *Maxwell v. Wattenhall*.——But if given out of the personal estate, and no time for payment mentioned it shall carry interest only from the end of the year after testator's death, and Lord Chancellor said, he took this to be the settled difference. *Ut supra*.

5. Money directed by will to be raised out of the profits of lands, yet being a gross sum North Keeper thought it would carry interest to the time it should be paid and raised out of the profits. *Vern*. 225. pl. 223. Hill. 1683. *Attorney-General v. Siderfin*.

6. A. bequeathed 500l. mortgage to his wife, willing her to give 200l. of it to M. his grand-daughter, an infant, to be paid at such times and in such manner as his wife should think fit, and made his wife executrix, the wife lived near 20 years after A. but never paid the legacy. North Keeper decreed payment of the 200l. with interest from A's death, though no demand was ever made of it in the life of the wife. *Vern*. 251. pl. 244. Trin. 1684. *Churchill v. Speke*.

7. Devise of 50000l. weight of sugar to be paid in ten years after testator's death; executor lapsed the ten years; decreed payment according to the medium-rate of sugars in the place where testator had a plantation, at the 10 years end, and interest from the time it became due. 2 *Vern*. 553. pl. 502. Pasch. 1706. *Symes v. Vernon*.

2 *Vern*.
594. S. C.

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8. Lands devised to J. S. paying the heir 20000l. within 20 years at 1000l. per ann. Per Cowper Lord Chancellor for every 1000l. from the time it became payable, the legatee or heir shall have interest, because both the sum and time of payment were certain and past, and there is to be no deduction of taxes of any kind, because it is not to issue nor arise from the lands, but is given as a sum in gross secured by entry on the lands for non-payment. 1 *Salk*. 156. pl. 7. 1707. in Canc. *GRIMSTON v. LORD BRUCE & Ux'*. Per Cowper Chancellor.

Legatee
Being an infant interest was decreed from the time the legacy was made payable by the will.

9. If a legacy be devised generally, and no time ascertained for the payment, and the legatee be an infant, he shall be paid interest from the expiration of the first year after the testator's death. But if the legatee be of full age, he shall only have interest from the time of his demand after the year. 2 *Salk*. 415. Mich. 6 Ann. in Canc. *Smell v. Dee*.

Fin. R. 136. Mich. 26 Car. 2. *Maplet v. Pocock*.

Vern. 262.
Palmer v. Trevor.
S. P.——

10. Where a certain legacy is made payable at a day certain, it must be paid with interest from that day. 2 *Salk*. 415. Mich. 6 Ann. in Canc. *Smell v. Dee*.

Legacy was made payable within a year, but the legatee knew nothing of the legacy till the executor published it in the Gazette. The court would not give either interest or costs. *Ch. Prec*. 11. pl. 8. Trin. 1690. *Knap v. Powell*.——Though it be made payable at a day certain, it shall not carry interest but from a demand made. Per *Ld. Wright*. *Chanc. Prec*. 161. pl. 133. Pasch. 1701. *Jollist v. Crew*.

Gillb. Equ.
Rep. 89.
S. C.

11. A man by his will gives a legacy of 300l. to a feme covert without creating any separate trust of it for her benefit, and this legacy was made payable out of the reversion of lands expectant on an estate for life; though this legacy was charged on a reversion, which was not an immediate fund for raising of it, yet being given to the wife in present, when the fund comes in, it shall carry interest from the testator's death which must likewise go to children. Abr. Equ. Cases 45, 46. Mich. 1714. Atkins v. Dawbeney.

12. A. devised 1200l. to be distributed by B. among B's four children at twelve months end after B's death. Two of the four children died within the twelve months. At ten years end after the twelve months expired, B. paid 900l. to one of the survivors who gave a receipt in full of his share by which he was barred claiming any more; adjudged that B. ought to pay interest for the 1200l. from a year after A's death, and decreed accordingly, but the Master in computing interest was to take out of the principal so much as with the interest of it would make up 900l. when it was paid to that child, and then to carry interest for the remaining principal from the end of the year after A's decease, and decreed such principal with single interest to be paid the other child the plaintiff. 2 Vern. 744. pl. 652. Hill. 1716. Bird v. Lockey.

13. A. by his will gave several legacies, and amongst others 1000l. to L. his niece, who was the only child of M. sister and heir at law of testator payable at eighteen or marriage, and the residue of his personal estate to trustees to be vested in land and settled on B. for ninety-nine years, remainder to his first, &c. son in tail, &c. Afterwards A. by codicil appointed the 1000l. given by the will to be made up 6000l. and payable at twenty-one or marriage. Ld. C. Macclesfield decreed, that L. was intitled to the interest of the 6000l. from A's death, and said, that it had weight with him, that by the will the 1000l. left to her was given her at eighteen, but she coming to that age in A's life-time, the codicil ordered it to be made up 6000l. yet not to be paid till twenty-one or marriage, so that though the actual payment was stopt till twenty-one or marriage, it was however vested presently and being severed from the rest of the estate (which residuum only the defendant B. was concerned in) therefore the interest of the *6000l. from A's death could belong to none but the plaintiff L. Wms's Rep. 783. Hill. 1721. Achery v. Wheeler and Vernon.

In this case was cited the case of BOURN v. TYNTE above, which was said to be stronger than this, for that there was an express provision of 80s. a year for the education of the daughter to be paid to her mother which might by implication

be thought to exclude the daughter from any farther advantage of her portion untill she should come to twenty-one or marry, at which time the portion was to become due. And also that in that case the legacy was not vested, but if she should die before twenty-one or marriage, it was to sink, whereas here was a vested legacy transmissible to executors though L. should die before twenty-one or marriage. And that the devise there was to a brother, but here to a more remote relation and out of a much larger fund. Wms's Rep. 788. in S. C. — N. B. at the end of page 788. is a note that this case is misplaced in order of time not being decreed till Trin. Term following.

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14. If a legacy be given charged upon a dry reversion, it shall carry interest from a year only after the death of testator, a year being a convenient time for a sale. Per Ld. C. Macclesfield. 2 Wms's Rep. 26. Trin. 1722. Maxwell v. Wettenhall.

15. If

15. If a legacy be given out of a personal estate consisting of mortgages carrying interest, or of stocks yielding profits half-yearly, it seems in this case the legacy shall carry interest from the death of the testator. 2 Wms's Rep. 26. *Maxwell v. Wettenhall*.

16. If a legacy be brought into court; and the legatee has notice of it, so that it is his own fault not to pray to have the money, or that the money should be put out, the legatee in such case shall lose the interest from such time as the money was brought into court; but if the money was put out, the legatee shall have the interest, which the money put out by the court did yield. Per Ld. Macclesfield. 2 Wms's Rep. 27. Trin. 1722. *Maxwell v. Wettenhall*.

17. If a man devises lands for payment of his debts, the lands become as a security or mortgage for all the testator's debts as well those by simple contract as otherwise, and the simple contract debts shall carry interest as the land, which is the fund, yields annual profits. Per Ld. C. Macclesfield who said it was the daily practice. 2 Wms's Rep. 27. Trin. 1722. *Maxwell v. Wettenhall*.

In this case it was argued and not denied that where the devise is of a surplus to an infant, and if he dies before

18. A. by will devised to E. her niece an infant of about fourteen the surplus of her personal estate which was about 3000l. to be paid at twenty-one, and if she should die before, then to J. S. and devised also to E. a small estate in lands. The Master of the Rolls held clearly that E. was intitled to the profits and interest of the surplus from the death of A. in E's life-time, though E. should happen to die before twenty-one, and decreed accordingly. 2 Wms's Rep. 419. Trin. 1727. *Nicholls v. Osborne*.

twenty-one, then to go over, the surplus devised over is the same surplus which was devised to the infant; whereas it would be a different and greater surplus, were it to carry the interest accruing during the life of the infant added to what was the surplus at the time of the testator's death, which seems not to have been intended. Ibid. 420.

In this case Mr. Lutwich took a diversity between a legacy to a son and a legacy to a grandson; that in the last case where no time is mentioned for the payment, the legacy would be payable presently and equity of courts allows interest from the end of the year; but if the legacy be to a son, then from the death of testator. Ibid. 505.

19. So where 500l. was bequeathed to an infant grandson without mentioning any time of payment, with proviso to go over to another in case of the grandson's dying before twenty-one. The Master of the Rolls said, it was extremely clear, that this was a condition subsequent, and therefore as the infant's death before twenty-one would only defeat the legacy from the time it happens, it shall consequently carry interest in the mean time, at least from the end of the year after testator's death. 2 Wms's Rep. 504. Hill. 1728. *Taylor v. Johnson*.

time is mentioned for the payment, the legacy would be payable presently and equity of courts allows interest from the end of the year; but if the legacy be to a son, then from the death of testator. Ibid. 505.

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20. A legacy was left to an infant, the testator having a great deal of money in Bank-stock, the executor was residuary legatee; the bill was brought for the legacy, and question was, whether it should bear interest, and from what time. Pengelly Ch. B. and Hale B. It is a certain rule, that where the fund is certain, as when charged on lands it shall bear interest; so the fund on which it is charged produces a profit here; it is equally certain, and therefore should bear interest. Salk. 415. *Small v. Dee*. and should be from the testator's death. But this was opposed by Carter and Comings Barons;

Barons; that it should only bear interest from a year after the testator's death; for as legacies are to be paid after debts, the executor has that time to inquire; till which they are not payable, so not to bear interest, to which it was agreed. A difference was offered to be made, that as this was a legacy to an infant, it could not be safely paid, and therefore should not bear interest. To which it was answered by the Ch. B. it might be safely paid into the hands of an infant, having proper evidence of the payment, as is *Wentw. Exec.* 313. And per Carter, it may be paid into the hands of the guardian, having evidence; but if he takes security from the guardian, which should prove defective, there, as he does not rely on the security the law gives, must depend on that taken at his peril. *Sel. cases in Canc. in Ld. King's time*, 72, 73. *Mich. 13 Geo. Bilson v. Saunders.*

21. A legacy of 500l. was given to be paid in convenient time; it must bear interest only from the usual time of payment of legacies, though *land was charged with the payment*. *Sel. cases in Chan. in Ld. King's Time* 73, 74. *Trin. 2 Geo. 2. Hornly v. Hornly.*

22. Interest was recovered for a legacy, though *after a receipt given in full for the legacy*, and the principal legacy paid. 3 *Wms's Rep.* 126. *Hill. 1731. East & Maria 'Ux' v. Thornbury.*

23. A legacy out of a rent-charge shall carry interest but then it must be only in proportion to what the rent-charge brings in, not more; and if there be a surplus beyond the interest, that must go to the heir at law. 3 *Wms's Rep.* 254. *Paſch. 1734. Stonehouse & 'Ux' v. Evelyn.*

24. On a bill brought by a legatee against an executor interest shall not be given for the legacy till a year after the testator's death, unless where the interest is expressly given from the death of the testator; per *Ld. Chancellor Barnard. Chan. Rep.* 46. *Paſch. 1740. in case of Neale v. Willis.*

25. It is indeed true that where the party prays his satisfaction for a simple contract debt merely out of personal assets, the court will of course direct the debt to be paid with interest to be computed from one year after the death of the testator. But where a real estate is charged with the payment of debts as well as the personal, his lordship said, he did not know, that it was absolutely fixed that simple contract debts should carry interest from that time. *Barnard. Chan. Rep.* 229. *Mich. 1740. Lloyd v. Williams.*

(O. d) Maintenance. In what Cases to be allowed for or out of Legacies.

1. **W**HERE there is no provision by a will for maintenance, because the *legacies to be paid after the debts*, yet the defendant was allowed maintenance. Toth. 114. cites 2 Jac. Horton v. Long.

2. Children allowed seven or eight pounds per cent. for their education, where there is no allowance by the will. Toth. 68. 5 Car. Bright v. Chappell.

3. Legacies were made payable at 21; the legatees brought a bill by their guardians, suggesting that they had no maintenance, and prayed an allowance. The executor, who was the defendant, demurred, because the legatees were under age, and their legacies not to be paid till 21, and so had no cause of suit; but the court over-ruled the demurrer. Chan. cases 60. Mich. 16 Car. 2. Renneley v. Parrot.

Welf, Chan, Rep. 101.
Kinnerley v. Parrot.
S. C. and the demurrer over-ruled.—
Equ. Abr.] 301. pl. 1.
S. C.———S. C. cited by the Master of the Rolls. 2 Wms's Rep. 22. Pasch. 1722. in case of Harvey v. Harvey.

S. C. cited by the Master of the Rolls.
Pasch. 1722. 2 Wms's Rep. 22. in case of Harvey v. Harvey.
4. A. made his will and left 1200 l. in trustees hands to be paid to B. and C. or the survivor of them, at 18 or marriage, which should first happen, but nothing was mentioned as to interest or maintenance. It was decreed that the trustees pay the interest, profits or increase for the children's maintenance until the 1200 l. become due, and that they also pay all arrears of interest. Ch. Rep. 265. 18 Car. 2. Glide v. Wright.

Such portion devised by a father payable at 21, or at any other time certain, shall carry interest from his death, though no mention be made of maintenance, because he was obliged to provide for his children, had he lived. But of a devise in such manner by a stranger it is otherwise. Chan. Proc. 33. Trin. 1712. Attorney General v. Thompson.———But the Master of the Rolls said that it seems if one not a parent gives a legacy to an infant payable at 21, without any devise over, and the infant has nothing else to subsist upon, the court will order part of the legacy, in order to provide bread for him, to be paid presently, allowing interest for the same to the person paying it, out of the remaining principal, though this, he said, is done very sparingly. 2 Wms's Rep. 23. Pasch. 1722. in case of Harvey v. Harvey.———S. C. cited by the Master of the Rolls, but he said that the practice had been of late to allow maintenance even in case of legacies not vested. 2 Wms's Rep. 22, 24. Pasch. 1722. in case of Harvey v. Harvey.———Abr. Equ. cases 301. S. C.

6. Money expended for maintenance and education shall be allowed out of a small legacy given to an infant, though it breaks into the principal. But in case of a legacy of 1000 l. or the like, it is otherwise. Vern. R. 255. pl. 247. Mich. 1684. Barlow v. Grant.

7. In case of a personal legacy payable at 21 or marriage, the court has always appointed maintenance out of the interest of it, if not expressly

precisely limited otherwise in the mean time. And in the principal case the legacy being 3000*l.* and the child dead, 100 marks per ann. was allowed for it whilst the child was living, which was only to the age of five years. And there being a term raised by marriage settlement for raising the like sum, and now confirmed by the will, the land * was decreed charged with the 100 marks per ann. Maintenance. Chan. Prec. 195. pl. 157. Pasch. 1702. Brewin v. Brewin.

8. Devise by testator of *all his real and personal estate* to his eldest son, *charging the same with 1000*l.* a-piece to his youngest children payable at their ages of 21, but no notice taken of maintenance in the mean time.* The Master of the Rolls taking notice that these were vested legacies, and no devise of them over, decreed that the children should recover maintenance; the court doing but what the father if living ought to have done, viz. to provide for his children. 2 Wms's Rep. 21. Pasch. 1722. Harvey v. Harvey.

So where younger children are left destitute, and the eldest an infant, equity will make such allowance to the guardian of the eldest as

that he might thereby maintain all the children. 2 Wms's Rep. 21. Pasch. 1722. Harvey v. Harvey. — So likewise his honour said it had been held, that though a legacy were devised over in case of the legatee's dying before 21, yet the infant legatee ought to have interest allowed him during his infancy for his maintenance; but where the estate is small, the court has ordered the lower interest. 2 Wms's Rep. 21. Pasch. 1722. Harvey v. Harvey.

9. Lands devised in trust for B. for life, remainder for her children in trust, that they shall have and receive the profits thereof when they come of age. Per. Cur. they have an estate in fee as tenants in common, and (the mother being dead) they have right to their profits in the minority, at least to so much thereof as may be sufficient for their support and maintenance, 9 Mod. 104. Mich. 11 Geo. Bateman v. Roach.

10. A father by his will gave 2000 *l.* a-piece to his two daughters, payable at 21, charged on land and personal estate, and the personal estate being exhausted in debts, my Lord Chancellor held they should have a reasonable maintenance out of the real estate, until their legacies became payable, and allowed them 80*l.* per ann. each. Abr. Equ. cases 301. Trin. 1729. Conway v. Longville.

(P. d) Security.

In what Cases to be given for payment of Legacies.

1. A devise was of goods and a library to the defendant for life, and after to the defendant's daughter and her heirs for ever. The plaintiff married the daughter, who is since dead, so as the plaintiff, as administrator, seeks to compel the defendant to give security to deliver the goods to the plaintiff after the defendant's death, or the value thereof; decreed accordingly, and a commission is awarded to the Master to examine upon oath such witnesses as shall be

be produced before him. Chan. Rep. 110. 12 Car. 1. Bracken v. Bently.

2. *Infant by guardian sued for a legacy, and the legacy was decreed to be paid, but the guardian to give security, and the infant when of age to give a release.* Fin. R. 136. Mich. 26 Car. 2. Maplet v. Pocock.

3. A. devised his real and personal estate to B. his son, an infant, and made C. *executor during his minority*, and that C. should account to B. at his age of 21 years. Decreed that the executor give security to a Master to give a just account, and to pay what should appear due to B. at the age of 21 years. Fin. R. 317. Mich. 29 Car. 2. Edwards (by his guardian) v. Jordan.

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* 2 Vent.
358. S. C.
and S. P. by
Lord Chan-
cellor.

4. Lord Chancellor took a difference between a *suit for a legacy in Chancery*, and a suit for it in the *Spiritual Court*, that if in the *Spiritual Court* they would compel an executor to pay a legacy without security to refund a prohibition shall go. Vern. 93, 94. Mich. 1682. * Noel v. Robinson, cites the case of Knight v. Clarke.

5. Legacy devised to an infant payable at 23; the mother was made executrix and residuary legatee; she marries again, and dies; her baron takes administration *de bonis non*. Bill suggests *insolvency of administrator*. Decreed that he give security to pay the legacy when payable. 2 Vern. 249. pl. 235. Mich. 1691. Rous v. Noble.

6. A. bequeathed his personal estate to his wife for life, and *what she has left at her death it is my will that it may be equally distributed between my own kindred and her's*. If the estate be so small that she cannot live upon it without spending the stock, it seems she shall not be obliged to give security, otherwise she shall. Chan. Prec. 72. pl. 64. Pasch. 1697. Cowper v. Williams.

So of an
executor on
a suggestion
of his wasting the estate.

7. An executor trustee that is insolvent shall give security. Carth. 458. Mich. 10 W. 3. B. R. The King v. Raynes.

Ch. Cases 121. Hill. 20 & 21 Car. 2. Duncamban v. Stint.

* Upon
their own
recogni-
zance. Ch.
Prec. 227.
S. C.

So where
the portions
were payable
at marriage with consent,

8. *Portions devised to daughters payable at no certain time, provided if they marry without consent of B. the portions were to go over.* Ld. Wright decreed the portions to be paid [the daughter being upwards of 21] but upon * security to re-fund on breach of the condition. 2 Vern. 452. pl. 415. Mich. 1703. Aston v. Aston.

but the daughters were advanced in years. Fin. R. 62. Hill. 25 Car. 2. Needham v. Vernon and Booth.

9. *Specifick legacies were given to be delivered after the death of executor.* Decreed that security be given. Affirmed in the House of Lords. 9 Mod. 93. Pasch. 10 Geo. Burdett v. Young.

(Q. d) Abatement and Refunding by Legatees. In what Cases.

1. **A.** Bequeathed 30 twenty shilling pieces to B. 20 to C. and 10 to D. which were in such a chest or place. When A. died there were found no more than 30 in all, in that place. If the testator left sufficient to make good all those 60 pieces bequeathed, quære, if that which is wanting in the casket shall not be supplied and made up? Wentw. Offices of Executors, 251.

he had only 500 l. Bank-Stock in the whole. It was insisted that testator probably intended to buy another 500 l. Bank-Stock, and that there being assets left sufficient over and above all debts and legacies to answer both 500 pounds, both ought to be paid and made good out of the estate; and Ld. Mardwick was either of the same opinion or decreed accordingly. (Quære, I think that I was informed that this was first at the Rolls, and after that Ld. Hardwick held or decreed accordingly, and that this was about Mich. or Trin. Term 1738.)

2. *Executor not bound to pay a legacy without security to refund in case of defects of assets.* Chan. cases 149. in case of Grove v. Banfon, cites it as resolved by advice of the civilians in 1639. in the case of Picks v. Vinckner. 2 Chan. cases 132. Tildley v. Thorgmorton. S. P.

3. *An executor is not bound to pay a legacy without security, to refund in case there be a defect of assets.* Chan. cases, 149. Mich. 21 Car. Grove v. Banfon. [419]

4. A man had a conveyance and a statute for his wife's legacy, and yet was made to refund. Arg. Chan. cases 137. Mich. 21 Car. 2. cited as the case of Grove. v. Banfon.

no want of assets originally, but the executor had wasted them and was insolvent.

5. *Executors must not pay their own legacies first, if not enough to pay all; for all must be in proportion.* 3 Chan. Rep. 54. 22 Car. 2. Butler v. Coote.

6. A. the father of B. and C. bequeathed 400 l. to B. and 300 l. to C. and died. Afterwards M. the mother bequeathed 200 l. to C. and made B. executor. J. S. took administration during the minority of B. Afterwards W. R. as guardian of C. sued J. S. for C's legacy; and the court decreed that in case of want of assets the legacies of 400 l. to B. and of 300 l. and 200 l. to C. should be paid in proportion out of the personal estate, and upon J. S. paying the same that W. R. gave security that C. when of age, should give a release, &c. Fin. R. 136. Mich. 26 Car. 2. Maplet v. Pocock.

7. *An executor shall not be forced to pay legacies until the legatees shall give bond to refund in proportion, or in the whole, for the satisfaction of debts, if any do appear unsatisfied.* Yet the legatee upon his bill in the court shall refund, and this as well as where it is legacy in specie, as a horse, or 1000 l. actually paid; for the legacies are not due till the debts be paid, and a legacy being paid, remains as a legacy in the hands of a legatee after payment. Per Ld. K.

Ld. K. said, it was a rule in this court. Chan. cases 257: Hill. 26 & 27 Car. 2. Chamberlain v. Chamberlain.

8. Administrator of an *intestate* makes an *executor*, and bequeaths a legacy to J. S. and dies. *Pending a suit against the executor for recovery of the goods in right of the intestate, the executor pays the legacy, and afterwards the goods are evicted.* The executor shall not make the legatee refund, and Finch C. dismissed the executor's bill. 2 Chan. cases 9. Mich. 31 Car. 2. Hodges v. Waddington.

A. had bound himself and his heirs in a

bond, and after by his will devised his freehold lands to B. in fee; and not charging them with debts or legacies, and gave his copyhold lands to C. in fee in trust to sell to pay his debts and legacies, and gave a legacy of 500 l. to D. and died, making E. executor. The copyhold was not surrendered, so that it was not liable. Ld. Harcourt decreed that as to so much of the personal estate as was exhausted by the bond debt, D. should stand in the place of the bond creditor against the land, and that the freehold should be liable in default of personal assets to pay the legacy. But upon appeal Ld. C. Parker reversed that part of the decree; for every devise of land is a *specific legacy*, and shall not be broken in upon, or made to contribute towards a pecuniary legacy. And had the land devised been *only of a term for years*, and not a fee as in the principal case; such *specific legatee* of a lease should prevail against, and not contribute towards the pecuniary legacy. Mich. 1720. Wms' Rep. 678. Clifton v. But.

2 Chan. Rep. 138. German v. Colston.

10. A. devised to B. *lands of one hundred pounds per annum in fee, to be set out by his executor*, and five thousand pounds to C. and three thousand pounds to D. Executor sets out lands of greater value, so as there was not sufficient to pay the other legacies. Per Ld. Chancellor, this is *not a specific legacy* but *quantitatis*, and therefore each should bear his share of the loss. But B. having sold part of the lands to be decreed that a Master examine the value of the lands, &c. what they were worth to be sold at the testator's death, and if B. had more than his proportion of the whole value to pay for it. 2 Chan. cases 25. Pasch. 32 Car. 2. v. Wilkinfon.

And though his legacy was secured by a statute and mortgage. Chan. cases 148.

Mich. 21 Car. 2. Grove v. Banfon and Grove. — So shall *legacy to executor for care and pains.* 2 Vern. 434. pl. 397. Pasch. 1702. Fretwell v. Stacy.

* As where the legacy was of a debt secured by the statute. Fin. Rep. 303. Trin. 29. Car. 2. Smallbone v. Brace. — Ld. Chancellor thought they ought to contribute, but directed to precedents. 2 Chan. cases 171. Hill. 1 Jac. 2. Comins v. Comins. — But Ld. Harcourt Chancellor contra. 2 Salk. 416. pl. in Canc. Hern v. Merrick. — 2 Vern. 111. S. P. Per Lords Commissioners. — If devised generally they shall not. Chan. Prec. 393. Mich. 1714. Sayer v. Sayer. — 2 Vern. 688. S. C. — S. P. per Ld. C. Cowper. Chan. Prec. 401. Pasch. 1715. in case of Linguen v. Souray.

† S. P. Fin. Rep. 422. Trin. 31. Car. 2. Powel v. Stakes. — Pl. Com. 545. The executor may pay which he will, in case of Paramour v. Yardley.

But in Chancery though there is no

12. If in the Spiritual Court they would compel an executor to pay a *legacy* without giving security to refund, a prohibition will be granted. Vern. 93, 94. Per Ld. Chancellor, cites the case of Knight v. Clark. provision made of refunding, yet the common justice of this court will compel a legatee to refund, per Lord Chancellor. Vern. 94. Noel v. Robinfa.

13. A.

13. A creditor shall compel a legatee to refund, and so shall one legatee another legatee where the assets become deficient. Vern. 94. Mich. 1682. Noel v. Robinson.

2 Vent. 360. Hodges v. Waddington.—Arg.

Vern. 92. says it was settled in the case of Chamberlain v. Chamberlain.——See Ch. cases 135. Nelthorpe v. Hill, &c.—2 Ch. Rep. 137. German v. Colston

14. But whether the executor himself after he had once voluntarily assented to a legacy shall compel legatee to refund is *causa prime impressionis*, and it must be allowed that there is a great difference between a voluntary and a compelled assent; per Lord Chancellor. Vern. 94 Mich 1682. Noel v. Robinson.

Ch. cases 136 admitted by the court that he shall for want of assets. Nel-

thorpe v. Biscoe.—2 Vern. 205. Hill. 1690. Newman v. Barton. S. P.—Executor pending suit for the estate voluntarily paid a legacy, the estate is *exhausted* he is without remedy. 2 Chan. cases 9. Hodges v. Waddington.—Decreed that neither the executor or any other legatees can compel a legatee to refund unless where the payment was compulsory. 2 Vern. 205. Hill. 1690. Newman v. Barton.—Nor will the court relieve the executor upon suggestion of fraud by misrepresenting the value of the assets, they being beyond sea, Lord Chancellor taking notice, that no fraud or misrepresentation appearing to have been used by the legatees who had been paid, and there being more reason to think that the executor was better informed of testator's estate than the legatees, he would not order any refunding or cost on either side. 2 Wm's Rep. 291. 293. 296. Trin. 1725. Coppin v. Coppin.

15. Where legacies are given and the estate falls short, each legatee shall proportionably abate; admitted the law to be so. 2 Chan. cases 124. Mich. 34 Car. 2. Haycock v. Haycock.

16. Charitable legatees not to refund to other legatees; per North Keeper. Vern. 230. pl. 226. Hill. 1683. Fielding v. Bond.

17. A legacy to be paid to the eldest in the first place, denotes not preference in the quantity. 2 Chan. cases 132 Hill. 34 & 35. Car. 2. Tillsley v. Trockmorton.

18. A legatee shall refund against a creditor of the testator that can charge an executor only in equity, viz. upon a *wasting by the first executor*; but if an executor pays a debt on a simple contract there shall be no refunding to a creditor of an higher nature. 2 Vent. 360. Pasch. 35 Car. 2. in Canc. Hodges v. Waddington.

Vern. 162. Anon.

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19. Suit was for a legacy; the defendants demanded allowance for their own legacies first, but it was denied, and ordered that an account be taken of the whole estate, and the defendants and plaintiffs to abate equally and proportionably for what the estate falls short; and so not like the case where executors pay their own debts first at common law, or him that first sues his debt in equal degree before the other. 2 Freem. Rep. 134. pl. 163. Butler v. Wallis and Coole.

20. A legacy was given to A. when he should be 24. The executor pays part before the time to put him out into the world, and gives bond for the residue to be paid at a day certain, which was the very day he would be 24. A. died before 24. Bill was brought for repayment of the money and to deliver up the bond, and charged an agreement to that purpose, which defendant denied. Lord Ch.

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Jefferies

Jefferies declared it was fit to be heard on the merits. 2 Vern. 31. pl. 22. Mich. 1687. *Luke v. Aldern.*

21. A man devised a *rent-charge* of 10 l. *per annum* to A. *issuable out of Black-Acre, with a clause*, that if it should be behind, it should be lawful for him to *enter*, and hold till he was satisfied; and by the same will devised a *like rent-charge* of 10 l. *per annum* to B. *issuable out of the same land, with like clause* of entry, &c. The land was not of sufficient value to answer both the rents, and they were both in arrear, and both devisees had brought several ejectments and had recovered; and the defendant being in possession, the other grantee brought his bill to have an account of the profits, and that one moiety might be applied to satisfy the arrears of his 10 l. *per annum*, and it was decreed accordingly. Abr. Equ. cases 115. Hill. 1697. *Eure v. Eure.*

2 Vern.
477. pl. 432.
S. C. de-
creed ac-
cordingly.
—2 Freem.
Rep. 277.
pl. 347.
S. C. de-
creed ac-
cordingly.

22. A. seized of three houses, on which there is a *mortgage* of 1600 l. which A. had covenanted to pay. A. devised them severally to B. C. and D. and bequeaths legacies to E. F. G. and H. amounting to as much as he estimated his personal estate would arise to, and directed, that if his estate fell short, the legatees should abate in proportion. The personal estate fell short above 10700 l. Decreed the *pecuniary legatees* only to abate, and the devisees of the houses not to contribute or to take to themselves the burthen of the mortgage, but to be taken out of the personal estate. 3 Ch. R. 306. Mich. 1703. *Hawes v. Warner.*

23. A. intitled to 8000 l. in the *chamber of London*, makes a will while the stop was there, and declares, that when his executors should have received it, he gave 2000 l. to the three hospitals. It fell out that the 8000 l. was worth but 6300 l. after the act of parliament for settling a fund for paying a perpetual interest for the *orphan's debt*; yet per Ld. Keeper the devise is not of 2000 l. part of the 8000 l. but a charge on the whole, and had the debt increased in value to 10000 l. yet the legacy was not to increase, and so now not to be reduced, and decreed the whole 2000 l. 2 Vern. 547. pl. 497. Pasch. 1706. *Colwall v. Bonython, Longeville & al.*

The lega-
tee of the
money to
be laid out
in a pur-
chase can-
not say that
he has a
right to the
sum (as
1500 l. for
instance) in
specie; per
Ld. C.
Parker,

24. Though *pecuniary legatees* shall be paid in proportion, yet a *legacy of money given to be laid out in exchequer annuities and to be enjoyed by testator's wife for her life, the releasing her dower*, and after her decease to go equally to his two daughters, shall have the preference, and if there be not assets enough to pay other legacies bequeathed by him, they must be lost; and the money ordered to be laid out in annuities, or if it was directed to be laid out in land is in equity to be looked upon as an annuity or land, and consequently to be taken for a *specifick devise* and not a *pecuniary legacy*, and is therefore to be preferred; * per Lord C. Cowper. Wms's Rep. 127. Trin. 1710. *Burridge v. Bradyl.*

and he asked if it were possible, supposing there was 1500 l. of the testator's money lying on the table that the plaintiff the legatee should say, I have a right to this very money in specie, and, if not, then it is no specifick legacy. Wms's Rep. 539, 540. Trin. 1719. *Hutton v. Pinke.*

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25. If a man by will gives several specifick legacies and devises the residue of his estate to *J. S.* and his circumstances vary so that the residuary part becomes very inconsiderable, yet the residuary legatee must content himself with it, and shall have no assistance from the specifick legatees; per Cowper C. Ch. Prec. 401. Pasch. 1715. in case of *Lingwen v. Souray*.

26. A. had three sons, and having a personal estate of 20000*l.* bequeathed 3000 *l.* a-piece to his younger sons and the surplus to the eldest, and made his wife executrix and guardian (the sons being infants.) The estate consisting in stocks, was afterwards much diminished by the extravagance of the mother's after-husband. The younger sons brought a bill for their 3000 *l.* legacies, but *Ld. C. Cowper* directed the Master to take an account of what was the clear personal estate of testator at his death, and it consisting but of few items, his lordship thought the testator must know what would be the clear amount, and that he meant the surplus thereof as a legacy to his eldest son, and ordered all the three sons to receive *pari passu* in respect of the value of the surplus given to the eldest, which was to be taken as a legacy, and in regard to the legacies of 3000 *l.* each to the two younger sons. *Wms's Rep.* 305. Hill. 1715. *Dyose v. Dyose*.

27. If the executors of a freeman of London prove insolvent so that a loss happens to the estate, it shall be borne out of the testamentary part only; per Cowper C. Ch. Prec. 409. Trin. 1715. *Read v. Duck*.

28. A freeman of London having issue two daughters devised to them 6000 *l.* a-piece, and made his wife executrix, and his personal estate was computed at 18000 *l.* Upon a treaty of marriage between the widow and A. her share was supposed to be 6000 *l.* and 600*l.* per ann. jointure was settled as an equivalent. But in case a deficiency should be, collateral security was given to make it up so far as a small matter would amount to; afterwards the wife died, and a loss of 12000 *l.* befel the personal estate. Decreed that the loss should be born by all in proportion, especially the husband taking the 6000 *l.* portion upon an open and unliquidated account. Per Cowper C. Ch. Prec. 431. pl. 283. Hill. 1715. *Paget v. Hoskins*.

*Gillb. Equ.
Rep. 111.
S. C.*

29. Legatees of a freeman of London must abate in proportion, if the legatory part be not sufficient. 2 Vern. 754. Mich. 1717. *Stanton v. Platt*.

30. Legacies were given by will, and other legacies by codicil. The legacies by the will were charged on land, but not the legacies by the codicil, by reason of its not being witnessed. The Master of the Rolls decreed the legatees by the will to be paid out of the real estate, and if that prove deficient, they must as to the surplus, come in in average with the legatees in the codicil, to be paid out of the personal estate, and that the specifick legatees must be all paid and not abate in proportion; but that charities devised, though preferred by the civil law, ought to abate in proportion; for they are but legacies. And the testatrix having bequeathed 200 *l.* for a monument for her mother, it was objected that that ought not to

abate in proportion, it being a debt of piety to her mother's memory, from whom testatrix had the greatest part of her estate. And to this the court inclined, but however reserved that point. Wms's Rep. 421. Pasch. 1718. *Masters v. Sir Harcourt Masters*.

* 31. As by a defect of assets all legatees are to be paid in proportion; so if the executor pays one legatee, yet the rest shall make him refund. Per the Master of the Rolls. Wms's Rep. 495. Mich. 1718. Anon.

32. So if one gets a decree for his legacy and is paid, and afterwards a deficiency happens, he shall refund. Ibid.

33. But if the executor had assets for all at first and after a deficiency arises by his wasting them, the legatee who recovered shall retain; for vigilantibus & non dormientibus jura subveniunt. Ibid.

34. As a specifick legatee shall not contribute to the loss of a pecuniary legatee; so on the other hand, if such specifick legacy (as suppose a lease) be evicted, or (being goods) are lost or burnt, or (being a debt) be lost by the insolvency of the debtor, in all these cases such specifick legatee shall have no contribution from the other legatees, and therefore shall pay no contribution towards them. Per Ld. C. Parker. Wms's Rep. 540. Trin. 1719. in case of *Hinton v. Pinke*.

35. Bill by an executor against a legatee to refund a legacy voluntarily paid him by the executor, the assets falling short to satisfy the testator's debt. Decreed that the defendant should refund to the plaintiff, and that an executor may bring a bill against a legatee to refund a legacy voluntarily paid, as well as a creditor; for the executor paying a debt of the testator out of his own pocket, stands in the place of the creditor, and has the same equity against a legatee to compel him to refund, contra to the opinion in 2d Vent. 358. *NOELL v. ROBINSON*, and 2 Vent. 360. *HODGES v. WADDINGTON*. Per Jekill M. R. MS. Rep. Pasch. 4 Geo. Canc. *Davis v. Davis*.

36. A. having two sons and a daughter bequeathed to each of his sons 2000 l. and also to his daughter 2000 l. payable at 21 or marriage, proviso that if assets fall short, yet the daughter shall be paid her full legacy, and that the abatement shall be borne proportionably out of the son's legacies only. The assets left were sufficient, but the executor wasted them, and so a deficiency happened. It was decreed by the Master of the Rolls that the daughter's legacy should in this case abate in proportion. But on appeal Ld. C. Parker reversed the decree, and said that as the testator had not restrained it to any particular means by which the assets should fall short, it must be taken generally, viz. If by any means there should be a deficiency, as loss by fire, or by badness of title; on which the money was lent; and decreed to the daughter her full portion, and the abatement to be out of the legacies of the sons. Wms's Rep. 668. Mich. 1720. *Marth v. Evans*.

37. If a freeman of London dies without issue, his wife is entitled by the custom to the moiety of her husband's personal estate in value, but

but not in specie; if a freeman of London makes his will and disposes of his whole estate without any notice of the custom, and gives several specifick legacies, and several pecuniary legacies, and devises the residuum to A. and the widow waives her legacy and claims a moiety of his personal estate by the custom, if the residuum be sufficient to answer her moiety or share it shall be taken out of the residuum, but if that fall short, then the pecuniary legatees shall abate in proportion, and if the residuum and pecuniary legacies be sufficient to answer her moiety, the specifick legacies shall not be brought in to contribute, but enjoy their legacies intire. Per Parker C. MS. Rep. Trin. 5 Geo. in Canc. Kitson v. Robins.

38. Testator gives 60 l. a-piece to his executors, and 3 l. a-piece to the poor of several parishes, and 5 l. a-piece to his servants, besides several other charities, and in the same will apprehending there would be a surplus gives further legacies, and after all this makes a codicil, and thereby gives more legacies, and provides that if a deficiency should happen, then 200 l. given by his will for re-building a chapel should not take effect, but only a convenient part toward beautifying the old chapel. There happened a deficiency, and thereupon it was decreed by the Master of the Rolls, that the legacies in the former part of the will should be preferred, and those in the latter should be lost, and likewise the legacies in the codicil should abate in proportion, had it not been specified that they should in case of deficiency be paid out of the 200 l. and that the * charity legacies should abate in proportion with the others, but the 3 l. given to the poor was taken as part of the funeral, and so no abatement. 2 Wms's Rep. 23. Pasch. 1722. Attorney General v. Robins.

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a pious or charitable legacy to others, yet our law does not. Mich. 1720. Wm's Rep. 675. Attorney General v. Hutton.——MS. Rep. Mich. 7 Geo. in Canc. Attorney General v. Ansdon * al'. S. P. and seems to be S. C.

* S. P. by Ld. C. Parker, who said that though the Romans preferred

39. Where several legacies are given out of bonds, securities, &c. and these fall deficient there shall be an abatement among them only, and not affect other legatees; where there are several pecuniary legatees they must abate in proportion, but no specifick legatee, except in case of his legacy. Per Master of the Rolls. Hill. Vac. 1723.

40. An estate pur autre vie was limited in trust for A. his executors and administrators after the death of J. S. in possession. A. devised this reversion to his wife for life, remainder over; and dying indebted, a bill was brought by a creditor to charge this estate with his debt, and Ld. C. King after decreeing it to be personal estate, and that it could not be devised away from his creditors, said, that nevertheless this being a specifick devise, all the rest of A's personal estate not specifically devised, must be first applied to pay the debts, and if there be any other specifick devise, the same ought to come in average with this, and pay its proportion, but if that will not serve, all must be sold to pay testator's debts. 2 Wms's Rep. 381. Mich. 1726. Duke of Devon v. Atkins.

K k 3

41. Where

41. Where a *legacy* is given to executors for care and pains, it is wrong that that case should receive a different determination from the case of a legacy being given to executors generally, in which it is admitted, that the executors ought to abate in proportion with the other legatees; and where a legacy is given to executors generally, it is understood to be for their care and pains; and when these words are expressed in the will, declaring that the legacy is given them for their care and pains, they are rather the words of the scrivener and drawer of the will, than the maker of it; for which reason the making a difference between the one case and the other, would be to make a distinction on too slight a foundation. And though the bequest is expressed to be for care and pains, yet still it is *but a legacy which must proceed from the bounty of the testator*. It is not to be considered as a debt or contract, for the care and trouble of the executor is only the motive on which the testator exercises his bounty by way of legacy; and let the motive of the bounty be what it will, whether past and executed, or future and executory, it is all the same. An executor when he proves the will, may be supposed in some measure to know the state of the testator's affairs. And if he does prove the will, he takes the legacy subject to the contingency of abating in case the estate proves deficient. Barnard. Chan. Rep. 435, 436. Pasch. 1741. *Herne v. Herne*.

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(R. d) Refunding.

Where Refunding is directed by Will to make an Equality. How much shall be refunded.

1. A. On the marriage of M. his niece agreed to leave, &c. 30*l*. a year in lands at his death to the children of M. (for so the case in effect was as the same was decreed) and afterwards making his will, and having therein given an estate to S. a younger niece, adds that if the estate given to his younger niece S. should prove of a greater value than what he had before given to his niece M. then so much should be taken from S. and be refunded to M. as would make them equal. It was objected that what the children of M. were intitled to by the marriage articles, could not be taken as given to M. But Ld. C. King held clearly that the provision by the marriage articles for the children of M. ought to be looked upon as part of the provision for M. and as done for her, since it was doing that for her children which otherwise she or her husband would have been obliged to do themselves. 2 Wms's Rep. 343. Hill, 1725. *Thomas v. Bennet*,

(S. d) Remedy

(S. d) 'Remedy for Legatees and Devisees.

1. A Man shall have *trespass of any thing certain* which is devised to him before he has the possession of it; contra of a thing uncertain; Brook says, quod mirum, for it may be that there are debts which are not paid. Br. Devise, pl. 30. cites 27 H. 6. 8.

2. A term *for years* is devised to A. the executors of the devisor entered into the land devised to the *use of devisee*; per Cur. it is a sufficient possession for the devisee. 3 Le. 6. pl. 15. 2 Eliz. C. B. Anon.

If a devisee enters into a term, or takes *profits* without the *delivery of*

the executor, the executor may bring an action of *trespass* against him. Arg. Bridgm. E. 4. 9. 2 H. 6. 16. 11 H. 4. 84. 37 H. 6. 30.

54. cites 20

3. Devisee by a devise has *but a title of entry*, which *shall not be bound by any descent* as entry for mortmain, for condition broken; per three J. against Anderson J. and afterwards all agreed, that by the devise and death of the devisor, the frank-tenement in law and the fee was vested in the devisee notwithstanding that the heir had demised the premises to J. S. and had received the rent of J. S. and he died without having made any special entry, but only walking over the land without any special claim; for by this the heir did not gain any seisin to him, and so could not die seised, and consequently there could be no descent, and then the entry of the devisee was lawful. Le. 209, 210. pl. 293. Mich. 31 & 32 Eliz. C. B. Mathewson v. Trott.

2 Le. 150. pl. 239. Sir Anthony Denny's case. S. C. upon the death of the devisor an office was found without any mention of this devise; for which cause the queen self-

ed and leased all the lands so devised to a stranger during the minority of the heir. The heir comes of full age and has livery of the whole, and without any express entry leases the lands for years, rendering rent; the lessee enters and pays the rent to the heir; the heir dies; the lessee assigns over his term, and the rent is yearly paid to the right heir of the devisor; and now the heir entered, and per Curiam his entry is lawful.

4. A. devised his lands to B. and dies, and a stranger enters and dies seised before any entry by the devisee, now is the devisee without remedy. Arg. 2 Le. 147. cites 1 Cro. 92. Owen 96.

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It seems that in

either case the descent takes away the entry. See Cro. C. 200. Hulme v. Heylock.—If the heir enters and many descents follow, yet B. may enter at any time, for his entry doth not make an abatement or wrong, but may well stand with the devise; for if the devise be waved, or the devisee defers the execution of the devise, it is reason that the heir enter and take the profits till the devisee entereth, but if a stranger abateth after the death of the devisor, and dies seised, the same shall take away the descent. 2 Le. 150. pl. 234. Mich. 31 Eliz. C. B. Sir Anthony Denny's case.

5. Lease for years is devised to A. executor enters and takes a new lease; the court seemed to incline that A. may have the term as legacy notwithstanding the surrender by the executor in accepting a new lease. Mo. 358. pl. 487. Trin. 36 Eliz. Carter v. Love.

6. If the heir of the devisor enters and holds the devisee out, he may either enter or have his writ, called *Ex gravi querela*, and this writ (without particular usage) is incident to the devise. For otherwise if a descent were cast before the devisee did enter, the devisee

should

should have no remedy after an actual possession. This writ (Ex gravi querela) lies not, for then the devisee may have his ordinary remedy at the common law. Co. Litt. 111. 2.

Ibid. 112.
cites Mich.
2 Car.

Holmes v. Fletcher.

7. A legacy decreed, Toth. 130, cites Mich. 7 Car. Lord Pembroke v. Zouch.

8. The civilians said, that a legatee that had *got administration*, though it be afterward *repealed* upon a citation, should yet *retain* for his legacy; but not so upon an appeal, for there the administration is void ab initio. Vent. 219. Trin. 24 Car. 2. B. R. in case of Thomas v. Butler.

9. A. seised in fee devised to his children 1000l. payable at several times, by 50l. per annum, with which sums he charged his lands to be thereout paid, and then died; one payment of 50l. incurred due, then the lands were aliened by fine and proclamations and five years passed. The devisee sued for the whole; but decreed, that what grew due after the fine, was barred by the fine, but not the 50l. due before; for a trust is barred by fine. 2 Chan. Cases 247, Hill. 30 & 31 Car. 2. Wakelin v. Warner.

10. A suit was begun for a legacy and to discover assets, no assets sufficient being discovered. After other assets came to the executors hands, and a second bill for the legacy and assets thereon discovered. Ld. Chancellor gave decree for the legacy and damages from the first bill exhibited, for that was a good demand for the legacy though it was not prosecuted, and not only from time of assets, 2 Ch. Cases. 2 Hill. 30 & 31 Car. 2. Anon.

11. If legacies are given by will, and that in case of non-payment the legatees may enter and enjoy the profits of such and such land till satisfied; no demand is necessary, for it is no forfeiture but an executory devise though there be a place and time appointed for payment; per Pemberton Ch. J. at the assises. 2 Show. 185. Hill. 33 & 34 Car. 2. Pierfon v. Sorrell.

12. If a legacy be given to two, one cannot sue; or if residuum bonorum be given to several, they must all join; but when legacies are given to several persons, each may sue alone for his own legacy; per the Solicitor General. 2 Chan. Cases 124. Mich. 34 Car. 2. in case of Haycock v. Haycock.

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13. If executor sells in prejudice of a specific or residuary legatee they may have their remedy against the executor, but not follow the estate into the hands of a purchaser; per Cur. 2 Vern. 445. pl. 409. Mich. 173. Humble v. Bill.

S. C. cited
2 Vern. 672.
Pasch. 1711.
in case of
Minshul v.
Ld. Mobun.

14. Devisee may bring an original bill in nature of a bill of revivor, and shall have the same advantage of a decree as an heir or executor, and the defendant is not at liberty to make a new defence; per Cowper K. 2 Vern. 548. Pasch. 1711. Clare v. Wordell.

15. If a creditor or legatee, not party to the cause, comes in before the master, he shall have his costs, for it was in his power to have brought a bill for his legacy or debt, which would have put the estate to further charge; per Ld. Macclesfield; 2 Wms's Rep. 27 Trin. 1722. Maxwell v. Whettenhall;

(T. d)

(T. d) Remedy for Legatees, where the Personal Assets are diminished &c. by Creditors.

1. A. Seised in fee and indebted by bonds, by will gives legacy to children (whom he had otherwise provided for before) and devised his land to his eldest son in tail. The eldest son being executor, pays the bond with the personal estate. The legatees by bill prayed to be let into the place of the bond creditors, and to be paid out of the land. The court seemed to admit that if the lands had descended, the legatees might have been relieved out of the real estate, but since A. had devised the lands, it was resolved they ought to be exempted; for it was as much A's intention that the devisee should have this land, as the others should have the legacies, and a specifick legacy is never broke in upon in order to make good a pecuniary one; and this case is out of the statute against fraudulent devises, because the debts are paid, and the children being otherwise provided for, are not in the nature of creditors. Nota, this was on appeal from the Rolls, where the Master held that the real and personal estate should be so charged that both the debts and legacies should be paid. Per Harcourt C. 2 Salk. 416. pl. 3. *Hern v. Merrick*.

Ld. Keeper took notice that it appeared that the younger children were otherwise provided for, other land being devised to them, and there being no debts (they being paid) the statute is out of the case, and inclined that the heir being devisee in tail of the lands,

the legatees should have no remedy to come upon the real estate in the place of the bond creditors, but said he would reserve that point, and ordered precedents to be searched. Wms's Rep. 201, to 204. Trin. 1712. S. C. — The reporter adds, pag 204. That Mich. 1720 in the case of *Clifton v. Birt*, this decretal order of *Hern v. Merrick* was produced, and it appeared that this case was not resolved by Ld. Harcourt, but adjourned for further consideration.

2. Mr. Vernon said there had been cases decreed in this court, that where a legatee has been forced to abate of his personal legacy towards payment of debts, he had been *let in to stand in the place of a creditor to recover his proportionable satisfaction out of the real estate devised to be sold for payment of debts*. G. Equ. R. 73. Mich. 9 Ann. in case of *Hall v. Brooker*.

3. If a man by will gives a lease or horse, or any specifick legacy, and leaves a debt by mortgage or bond in which the heir is bound; the heir shall not compel the specifick legatee to part with his legacy in case of the real estate; but though the creditor may subject this specifick legacy to his debt, yet the specifick or other legatee shall in equity stand in the place of the bond creditor or mortgagee, and take as much out of the real assets as such creditor by bond or mortgage shall have taken from his specifick or other legacy. Per Lord C. Macclesfield. Wms's Rep. 730. Mich. 1721. in case of *Tipping v. Tipping*.

S. P. 3
Wms's Rep.
81. Trin.
1722. in
case of
Burton v.
Pierpont.

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4. A. mortgaged his lands and then makes his will, and says, *after payment of my debts and funeral charges, which I will to be first paid, I give my freehold estate in K. to my wife for life, chargeable with an annuity of 30l. for life to E. K. and after my wife's death I give my said freehold estate so charged to H. F. and K. and directs the residue of*

of his personal estate to be placed out at interest, and to be paid to his wife for her life, and after to be divided between H. J. and K. and gave 1500*l.* to his wife, provided she accepts the devises and bequests in lieu of dower. The personal estate was not sufficient to pay the 1500*l.* if the same should be applied in ease of the real. Lord C. Talbot decreed that the legatees be paid out of the personal estate, in case the mortgagee keeps to the real; and if he falls upon the personal, they have a right to stand in his room for so much out of the real estate as he shall take out of the personal; that being a proper fund for their payment. Cases in Equ. in Ld. Talbot's time 53. Mich. 1734. Lutkins v. Leigh.

5. If one owes debts by bond, and devises his lands to J. S. in fee, and leaves a specifick legacy, and dies, and the bond creditors come upon the specifick legacy for payment of his debt, the specifick legatee shall not stand in the place of the bond creditor to charge the land, because the devisee of the land is as much a specifick devisee as the legatee of a specifick legacy. 3 Wms's Rep. 324. Trin. 1734. Haslewood v. Pope.

(U. d) Remedy for Legatees, &c. where the Charge is on Lands, which prove deficient,

1. **A.** Gave legacies to his daughters, charging his real estate with payment thereof, and other legacies to his brother, without charging his real estate with payment of them. If the daughters recover their legacies out of the personal estate, then the brother shall stand in the place of the daughters, and take so much out of the land for their legacies as the daughters had exhausted out of the personal assets, and so it was decreed by the Master of the Rolls. 2 Wms's Rep. (619.) Trin, 1731. Bligh v. E. of Darnley,

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(W. d) Legacy.

Remedy in what Court,

1. **I**N trespass it was said for law that if a man *devises a thing certain* to another, and dies, *as a horse, &c.* and a stranger takes it, the devisee shall have action of trespass; and *contra* if it be uncertain, as if it is of the third part of his goods, &c. there is no remedy but to sue for it in the spiritual court. And this seems to be in the first case between the devisee and stranger; but quære if he may take it out of the possession of the executor; for it may be that the debts exceed the goods; and then the devise is void. Br. Devise, pl. 6. cites 27 H. 6. 8.

2. Goods are devised to B. the son and heir of A. B. sues in the spiritual court; executors say that B. is not son and heir of A.

This shall be tried in the spiritual court. Kelw. 110. a. pl. 33. *Casus incerti temporis.*

3. A. devised a term for years to B. B. may sue the executor in the spiritual court to execute the legacy. Arg. Pl. C. 543. b. Hill. 21 Eliz. in case of *Paramour v. Yardley.*

4. A motion that where the plaintiffs had exhibited their bill to be discharged of a legacy, the defendant since his suit sued in the spiritual court; and therefore day to shew cause why an injunction should not be granted. Cary's Rep. 104. cites 21 and 22 Eliz. Parre & Ux. v. Tipelady & Ux.

5. Lands were devised to be sold for payment of legacies; the lands being sold, the suit for the money to be distributed may be in the spiritual court, contrary to the opinion in 4 and 5 P. and Mariae, although it be rising out of land; per Barkley J. and agreed by Croke J. Cro. C. 396, 397. and cites 9 EL D. 254. Because the land being sold, the money is personal, and assets in the hands of the executors; per Croke J. Cro. C. 397. — See 2 Bullst. 257 *Samborn v. Samborn*; per Coke Ch. J. contra, unless where the devise is that trustees shall sell the land, and the money remain in their hands to pay legacies with. But if the devise be of land to be sold by J. S. and 100 l. to be disposed of to A. 100 l. to B. this last belongs only to the common law, but the other properly to the spiritual court. Agreed to per omnes. — S. P. 2 Le. 119. pl. 163. Mich. 29 & 30 Eliz. B. R. *Gering's case.* — S. P. Poph. 59. Mich. 36 and 37 Eliz. B. R. Lord Rich's case.

6. A legacy was given upon condition; the legatee promised and agreed to perform the condition, and then sued in the spiritual court, and the executor pleaded this matter there, which was refused, and so a prohibition was granted. Cro. E. 274. pl. 3. Hill. 34 Eliz. C. B. Pet v. Bafeden.

7. * Executor gives bond to legatee to pay the legacy at a day certain. Legatee before the day sues in spiritual court. Prohibition was granted; for the legacy is extinct; but per Williams J. if the bond had been made to a stranger, the legacy was not extinct. 2 Brownl. 11. Mich. 8 Jac. B. R.

* The legacy is drowned in the bond 8 Mod. 328. Per Cur. in case of *Cu-*

band v. Dewsbury; and denied the opinion of Doderidge J. 2 Roll. R. [160. Pasch. 18. Jac. B. R.] in *Gardiner's case*; where Doderidge held that in such case the obligee may sue for the legacy in the court christian or at common law upon the obligation; for he said that the taking the obligation for payment had not totally destroyed the nature of the legacy. — See the opinion by Anderson as to a covenant by the executor for payment, that if the legatee afterwards sues the executor in the spiritual court afterwards, he shall have a prohibition, quod ceteri iudicarii negaverunt. 2 Le. 119, 120, pl. 164. 29 and 30 Eliz. C. B.

8. If a legacy be granted out of lands in * fee-simple, this shall not be sued for in the spiritual court. But if one by will devise land to be sold for payment of legacies, this shall be sued for in the spiritual court, by the opinion of the whole court. Brownl. 32. Anon. [430]

* Brownl. 34. S. P.

9. If a legacy be granted out of leases, the suit may be in the spiritual court, and shall not be prohibited. Brownl. 34. Anon.

Whether rent devised out of a

term was sueable in the spiritual court was doubted by Keeling and Twissden, but Windham thought it did; sed adjournatur. Lev. 180. Pasch. 18 Car. 2. B. R. *Rosse v. Rosse.* — Sid. 279. pl. 7. *Rumsey v. Ross*, S. C. and prohibition denied.

10. An executor was sued in the spiritual court for a legacy, who pleaded a recovery in debt against him at common law, ultra which to satisfy, he had no assets; the plaintiff there said the recovery was by covin, and that the plaintiff who recovered the debt offered to discharge

discharge the judgment, and the defendant would not. Resolved that the covin was properly examinable in the spiritual court, because the legatee could not sue for the legacy at common law, and therefore prohibition in this case was denied. Mo. 917, 918. pl. 1307. Pasch. 14 Jac. B. R. Lloyd v. Maddox.

11. If a debt, obligation, or such like *thing in action* be devised to another, the devisee hath no means to recover it, but by *suit in the spiritual court, or in some court of equity, to compel the executor to sue for it himself, or to make to the legatee a letter of attorney to sue for it in the executor's name* unless he be made executor as to the debt, and yet if the legatee have the bond, or specialty in his hands he may deliver it up or cancel it. So it is to be understood of the bequeathing of money payable upon a mortgage. See Perk. f. 527. Wentw. Off. Executors 18.

So where
a bond is
entered into
for the money. Het.
166.
Champ-
ney's case.

12. If a legacy be of twenty oxen, and a suit is commenced in the ecclesiastical court, and the other pleads payment of 20l. in satisfaction, there the proceeding must be at common law, because the legacy is altered. Per Yelverton J. Het. 87. Pasch. 4 Car. C. B. Warner v. Barret.

Yelv. 39. Goodwin v. Goodwin.——8 Mod. 328. Cuband v. Dewsbury.

13. Where a suit is in the ecclesiastical court *for lands and goods*, a prohibition may be granted as to the lands and they may proceed there notwithstanding as to the goods. Sty. 10. Pasch. 23 Car. Betsworth v. Betsworth.

14. The *estate of the testator into whose hands soever it comes* (besides the executors) shall be liable to legacies, and such person may be *sued in chancery* as well as the executor. Chan. Cases 57. Trin. 15 Car. 2. Nicholson v. Sherman.

15. So may the executor of an executor, if it be charged that the first testator's estate had come to such an executor's hands. Chan. Cases 57. S. C.

So where
grofs
frauds in
obtaining
the will
were proved
yet the
will relating
only to personal
estate, chancery
will not intermeddle
so long as the
probate is in
force; per Ld.
Jeffries. 2 Vern.
8. pl. 5. Trin.
1686. Archer v.
Morfe.——But
a will so obtained
shall have no aid
in chancery; per
Ld. Jeffries, Ibid.
76. Trin. 1688.
Nelson v. Oldfield.

16. A will by which a legacy is given being *under probate* ecclesiastical is pretended by the executor to have been revoked. Per Jeffries C. the will is under probate ecclesiastical and I will not try it here, but go to the ecclesiastical court and prove it there. 2 Chan. Cases 178. Mich. 2. Jac. 2. Attorney General v. Ryder.

17. I conceive the ordinary may *inforce payment of debts on contracts* as well as legacies, or *marriage money* and no prohibition lies; per Vaughan Ch. J. Vaugh. 97. Trin. 22 Car. 2. C. B. in case of Edgcomb v. Dec.

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18. *Bills to examine* witnesses in order to prove a codicil which he pretended was made by defendant's testator, whereby he bequeathed to the plaintiff all his goods then in the plaintiff's possession. But it appearing that this matter was *depending on an appeal in the Arches*, the defendant demurred, for that it is a *meer testamentary cause* and properly cognizable by the spiritual court, where the same is now litigated and where plaintiff has a proper remedy for the recovery and

and relief, and demurrer allowed. Fin. R. 218. Trin. 27 Car. 2. *Cawston v. Helwykes*.

19. Bill in chancery was brought by a *residuary legatee* to have a legacy of 25l. and an account of rents and profits of a certain farm, assigned by testator's father to testator for 900l. And this bill was brought *against an executor of an executor*, and an account was decreed accordingly. Fin. R. 39. Mich. 25 Car. 2. *Shrimpton* (by bill of revivor) *v. Holman*.

20. None can sue in the ecclesiastical court for a *legacy arising out of land*, because not within their consueance: 2 Show. 50. pl. 36. Pasch. 31 Car. 2. *B. R. Bastard v. Stockwell*. In case of a legacy's being granted out of *lands* suit in spiritual court shall not be prohibited. Brownl. 34. S. P.—Cro. J. 279. pl. 9. Pasch. 9 Jac. B. R. *LOVE v. NAPLESSEN*, where the lands charged were *part freehold* and part leasehold, a consultation was awarded it being a meer personal legacy and the same being raised by the devise of the land and he being dead without payment, and there being no action maintainable at common-law for it by account against his executors or otherwise; but *Williams J.* doubted.

21. After sentence against an executor for a legacy in the spiritual court, the executor brought a bill here against the legatee for an account of what personal estate of the testator's had come to the legatee's hands in order to enable him to pay debts; decreed an account and the plaintiff to be examined on interrogatories as to the value of the estate, and what comes to his hands, in which defendant was not to be concluded but admitted to make what proof she could to prove assets in plaintiff's hands, and if he has assets to pay the legacy then he is to pay the same with interest and full costs both here and in the spiritual court. Fin. R. 434. Mich. 31 Car. 2. *Bland v. Elliot & al'*.

22. If the spiritual court would compel an executor to pay a legacy without security to refund there shall go a prohibition; per *Ld. Chancellor*. Vern. 93. Mich. 1682. cites the case of *Knight v. Clarke*.

23. Legatee infant sues in spiritual court and pending suit in the spiritual court sues in chancery, the former suit depending being pleaded the plea was disallowed; for there is no such security for the infant's advantage as here and possibly not for interest, if placed out, and for bringing in account here, &c. 2 Chan. Cases 85. Hill. 33 & 34 Car. 2. *Howell v. Waldron*. Executor in trust of a personal estate may be sued both in chancery for an ac-

count and also at the same time in the prerogative court to bring in an inventory. Per *Ld. Keeper* *Bridgm.* 3 Ch. R. 72. 4 Dec. 1671. *Digby v. Cornwallis*.

24. A personal legacy to an infant is more properly cognizable in chancery than in the ecclesiastical court, and if the matter had proceeded to a sentence in the ecclesiastical court it was proper to come here for the executors indemnity, and that here legatees were to give security for the money, but not there, and this court would see the money put out for the children. Vern. 26. Hill. 33 & 34 Car. 2. *Horrel v. Waldron*.

25. The civil law is the law by which *legatory matters* are to be determined, and the spiritual court has unquestionably the proper jurisdiction thereof, and if by their law there is a preference given to charitable legacies, chancery has no power to alter the law in that

that point; per North Keeper, and refused to grant any injunction, or direct security for refunding in case of deficiency of assets. Vern. 230. pl. 226. Hill. 1683. Fielding v. Bond.

26. A bill may be brought against an executor for *discovery of the personal estate* before the will is proved, or during the litigation thereof in the spiritual court. 2 Vern. 49. pl. 47. Pasch. 1688. Dulwich College v. Johnson.

27. If executor be to pay legacies in another diocese where there are no *bona notabilia*, the way is to transfer the will thither where the legatee lives. Arg. 12 Mod. 252. Mich. 10 W. 3. cites Godb. 191. 2 Brownl. 12.

28. Executor being in a diocese out of his own, but *where goods lay*, was denied a prohibition, because citeable in respect of the locality. Arg. 12 Mod. 252. cited by Serjeant Genner as an anonymous case, about 5 W. & M. Ibid.

29. If a will be proved in the prerogative court, let executor be where he will, they of the prerogative court shall compel him to pay legacies; per Holt Ch. J. Ibid. Mich. 10 W. 3.

30. If money be devised out of lands, such devisee may have debt against the owner of the land for the money upon the statute of 32 H. 8. of Wills, and the action must be *against the tenant*; per Holt Ch. J. 6 Mod. 26. Mich. 2 Ann. B. R. Anon.

31. Any person intitled to distribution within the 22 Car. 2. cap. 10. is by consequence intitled to sue the administrator in the spiritual court to make good his account by proofs and examination upon oath, as a legatee was against an executor before that statute; per Cur. 1 Salk. 251. pl. 3. Hill. 6 Ann. B. R. The Archbishop of Canterbury v. Willis.

32. An injunction may not be obtained in chancery to stay a suit in spiritual court for a legacy upon a suggestion of payment, it being a matter there determinable and triable; but contra on suggestion of a collateral satisfaction, as a gift of land, &c. Per Master of the Rolls. Pasch. 1718.

33. Where the ecclesiastical court and chancery have a concurrent jurisdiction, which ever is first possessed of the cause has a right to proceed, and the same of all other courts. But where the husband sues in the spiritual court for a legacy given to the wife Chancery has granted an injunction to stay proceedings, because that court cannot oblige him to make an adequate settlement on her. Chan. Prec. 546. Mich. 1720. Nicholas v. Nicholas.

(X. d) Remedy for Devisee. Where and How. In Respect of Lands charged &c.

Because it is only a rent-charge. See 6 Rep. 56. b. 58. a. Hill. 4 Jac. C. B. Brediman's case.

1. IF one devises rent out of his land and charges the land with a distress, the devisee may make use of the remedy, but unless power be given him by the will to *distrain*, he may not distrain for it. Dyer. 348. a. b. pl. 13. Hill. 18. Eliz. Anon.

2. Devisee

2. Devisee may maintain an action at common law against a terre-tenant for a legacy devised out of land; for where a statute, as the statute * of wills gives a right, the party by consequence shall have an action at law to recover it; per Holt Ch. J. 2 Salk. 415. pl. 1. Mich. 2 Ann. B. R. *Ewer v. Jones*.

(Y. d) What shall be chargeable with Legacies.

1. **T**ESTATORS's estate in whosoever hands is liable in equity to legacies. Chan. cases 57. Trin. 15 Car. 3. *Nicholson v. Sherman*.

2. A lease renewed by an executor in some cases shall be liable to a legacy given by the testator. Chan. cases 191. Mich. 22. Car. 2. *Holt v. Holt*.

3. If a man gives a legacy and chargeth it upon Black-Acre, although this be not sufficient to answer the full value of the legacy, yet it shall not be charged on the personal estate. 2 Freem. Rep. 22. pl. 21. Trin. 1677. Anon.

4. And it was said per Ld. Chanc. that if a man deviseth 100 l. out of a lease for years, and the lease is determined, yet the legatee shall never resort to the personal estate for this legacy. 2 Freem. Rep. 22. pl. 21. Trin. 1677. Anon.

5. Mortgagor entered into a statute to pay the money and made his will and devised 500 l. to his daughter and died. The personal estate was taken in execution on the statute so that there was not assets sufficient to pay the 500 l. legacy; decreed that now the real estate which was in mortgage shall make good what was taken out of the personal estate and so the legatee was relieved. 2. Chan. cases 4. Mich. 32 Car. 2. Anon.

6. The father having a son and a daughter, made a will and devised in these words following (viz.) And as for my worldly estate which God hath blessed me with, I give my daughter 10 l. to be paid by my executor, and I give her 10 l. a year during her life to be paid by quarterly payments; and all the rest of my real and personal estate I give to my son, &c. The defendant had imbezzled the personal estate, and was gone into White-Fryers; and now the complainant exhibited a bill to charge the real estate with this annuity of 10 l. a year. Philips for the complainant argued, that the real estate ought to be charged with the payment thereof, because the testator having the prospect of his whole estate before him, did out of it devise this annuity to be paid to his daughter by express words, and that by the words following, (viz.) all the rest of my real and personal estate I give to my son, &c. it must be reasonably adjudged, that he intended his real estate should be charged with this annuity, for the words, all the rest of my real estate, &c. must import all the rest after the annuity satisfied, and can have no other construction. The court doubted of this matter, but said, it was reasonable the defendant should

should give security to perform the will. Nelf. Chan. Rep. 155, 156. 1689. Joyce's case.

† Vern.

411. S. C.—

* This case was denied

at the Rolls

Mich. 4

November,

1738. in

case of

Miles v.

Leigh. (Quere)

7. The father by will gave land to his younger son and made him executor, and gave an annuity of 5*l.* per annum to his eldest son, but does not expressly charge the land. But decreed per Lds. Commissioners that the devisee of the land being also executor the land shall be liable and the rather because it is a provision for a disinherited heir. 2 Vern. 143. Trin. 1690. † Elliot v. Hancock. cites * Cloudsley v. Pelham.

[434] 8. A. by will devised his lands to his brother who is his heir at law in fee, and gives several legacies, and makes his brother executor, desiring him to see his will performed. The real estate is charged with the payment of the legacies. Decreed per commissioners and affirmed on bill of review. Confirmed in Domo Proc. 2 Vern. 228. pl. 208. Pasch. 1691. Alcock v. Sparhawk.

9. A freeman of London devised 70*l.* for mourning. Per. Cur. mourning devised by the will must come out of the legatory part, and not to lessen the orphanage or customary part, but it was insisted that if there had been no directions by the will, or will had only directed that the expenses should not exceed such a sum, there the deduction must have been out of the whole estate. 2 Vern. 240. pl. 224. Mich. 1691. Deakins v. Buckley.

10. A. made his brother B. executor, and devised to him his real estate, and willed that out of his personal estate and a year's rent of his real he should pay his legacies, and devises 40*l.* per annum to C. to maintain him at Cambridge to be paid by his executor; it was proved by D. that the executor promised A. to pay the annuity, otherwise A. would have charged his real estate with the payment of it; it was admitted that the will had made only the year's profits of the real estate liable, but on the evidence of D. it was decreed, that the real estate stands charged with the annuity; affirmed on appeal to the Lord Keeper. 2 Vern. 506. Trin. 1705. Oldham v. Litchford.

11. A. devised lands to B. in tail, and 500*l.* payable to C. on a contingency, which happened within two years, but might never have happened. In the mean time the assets were all gone in discharging bond debts. C. shall not charge the executor who did nothing but what he ought to do, not shall he stand in the place of the bond creditors so as to charge the devisee of the lands; per Lord Macclesfield. Ch. Prec. 540. pl. 334. Mich. 1720. Chitton v. Birt.

(Z. d) How affected, or Chargeable with Debts or Legacies.

1. **D**EVISE to his wife of the *third part of all his goods.*

This does not take place till after debts and legacies paid.

D. 59. b. pl. 15. Pasch. 36 & 37 H. 8. Quære.

2. Devise to his wife of *the moiety of all his goods to be equally divided between her and his executors.* A. has goods to the value of 100 l. and owes by bond 20 l. the wife shall have 50 l. if the executors have assets. D. 164. a. pl. 57. Trin. 4 & 5 P. & M. Anon.

Goldsb. 149. pl. 74. S. P. and seems to be S. C. devise of the moiety of the per-

sonal estate to the wife, and then of *divers legacies*, and after of *the residue to another*, the wife shall have a full moiety, if the other be sufficient to pay the debts and the debts shall go out of the other moiety. Chan. cases 16. Mich. 14 Car. 2. Leo v. Hale, and cites D. 164.

3. A man that had several creditors makes his will, and *recites that for the payment of his legacies and debts he devises such lands to his executors, then he gives 800 l. to his wife, and 800 l. to his daughter, &c.* and says, that his will is, *that these several sums of money should be paid out of money raised upon the sale of his land*; and the value of the land falling short of the debts and legacies, the question was whether the debts and legacies should equally be paid, or whether the debts should be first paid? and it was held by Finch Ld. Keeper, that in this case the debts should be first paid. Freem. Rep. 305. pl. 374. Pasch. 1675. Hickson v. Witham.

Chan. cases, 248. Hyxon v. Wytham. S. C. — Fin. Rep. 195. S. C.

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4. And he took a *difference where lands were conveyed by deed in trust for the payment of debts and legacies*, there they should go *pari passu*, and should have proportionable satisfaction and the debts should have no preference; but where *lands were devised to an executor for the payment of debts and legacies*, this shall be intended that he shall have them as assets; because the testator shall not be supposed, without express words, to be so unconscionable, as to give his estate in legacies and leave his debts unpaid. Freem. Rep. 305. in pl. 374. Pasch. 1675, in case of Hickson v. Witham.

5. But if he *devises lands for the payment of legacies only*, this shall not be liable to debts, because it was in the power of the testator to dispose of it under what conditions and to what purposes he pleased; and if he would make so unconscionable a will he said he would make a better will for him. Freem. 305. in pl. 374. Pasch. 1675, in case of Hickson v. Witham.

6. And he agreed farther, that if so be he had devised *that his legacies should be first satisfied, and that then the remainder of the profits should go in satisfaction of his debts*, that then the legatees should be served before the creditors; but the naming of legatees first (as to say legacies and debts) gives no preference; but here his intention being apparently to provide for his debts and legacies, though the legacies are specified, and his desire that they should be satisfied,

Chan. cases. 248. 249. S. C. & S. P. accordingly. Fin. Rep. 196. S. C. & S. P.

yet it shall be intended in course of law, and that way that was most conscionable for the testator. But here he said, that there being a provision for the payment of his debts, there should be no difference between bonds and debts upon contract; but they should be equally satisfied; for being just debts, there should not be that difference betwixt them upon a nicety of law, that some should have all, and others none. Freem. Rep. 305. 306. in pl. 374. Pasch. 1675, in case of Hickson v. Witham.

7. A. seised of lands in fee subject to a mortgage devised them to B. for life, remainder to C. in fee and makes B. executor. A. leaves assets sufficient to pay the debts, yet C. being only devisee and not heir, B. shall not be decreed to discharge the mortgage in favour of C. but decreed B. to pay one third, and C. two thirds to redeem, per Finch Keeper. Chan. cases 271. Hill. 27 & 28 Car. 2. Cornish v. Mew.

8. A. seised of freehold and copyhold lands, whereof the copyhold was in mortgage devised to B. all her lands, together with all her personal estate for seven years on condition within that time to pay her debts, and then devised the fee to C. and if C. died without issue, then the fee to go over to B. Decreed that B. come to an account and discharge the mortgage and then the mortgagee assign the same to C. Fin. R. 278. Hill. 29 Car. 2. Pigg v. Coldwell & Edwards.

9. Devise of lands to be held by executors till B. his son attain 22 years. B. dies before he is 22. Decreed the executors to hold the land till B. would, if living, have been 22, and the plaintiffs debt on bond to be paid by the next heir, or the reversion to lie liable and charged therewith. 2 Chan. Rep. 136. 30 Car. 2. Warwick v. Cutler.

10. There were legatees of money in numero, and legatees in specie. The estate fell short; Lord Chancellor was strongly of opinion they ought to contribute; for he said the intention of the testator was as much that one should have all the money as the other, the whole specific legacy. But it being objected that the practice of the civil law, and this court had been otherwise; he directed to search precedents. 2 Chan. cases 171. Hill. 1 Jac. 2. Comins v. Comins.

11. A. wills all his debts to be paid before any of his legacies or gifts after mentioned, and then devised several pecuniary legacies, and after in the same will devised lands to B. on condition to pay 5l. per ann. rent to C. Per Jefferies C. the lands are not subjected to the payment of the testator's debts. The general clause in the beginning of the will shall be intended only of the personal and the pecuniary legacies thereout devised. Vern. 457. pl. 432. Pasch. 1687. Eyles v. Cary.

12. A. devised land to B. for payment of debts, and devised to * C. lands which A. had mortgaged, and gives C. his personal estate. Per Cur. C. must take the lands mortgaged cum onere, and the † personal estate also, though devised to C. yet must be subject to the debts, notwithstanding lands were devised for payment of the debts. 2 Vern. 183. Mich. 1690. Lovell v. Lancaster.

Fin. Rep.
414. Hill.
31 Car. 2.
† Lands de-
vised to
trustees for
payment of
debts, and
the personal
estate bequeathed to the wife. The personal estate was not to be subject to payment

of debts. *MARCH v. FOWKE & al'*.—Abr. Equ. cases 271. Hill. 1724. *ADAMS v. MEY-
RICK*. Where the devise to the trustees was *in trust, that they do and shall, &c. pay, &c. his debts,*
which is stronger than a bare charge on his real estate, and might be intended only auxiliary to his
personal estate, which without words of exemption might be liable in the first place.—A. bequeaths
20 l. to B. *whom he makes executor*, and devises his real estate to C. *on condition to pay his debts within two*
months, &c. Decreed per Lords Commissioners, that the personal estate shall be first applied to
discharge the debts, &c. Ch. Prec. 2: Hill. 1689. *GOWER v. MEAD*.

† Devised the surplus to his sisters, and his personal estate to his wife, whom he made execu-
trix, she having the personal estate exempt from debts, the debts being more than the personal
estate. Chan. Prec. 101. Mich. 1699. *RAMFIELD v. WINDHAM*.—S. C. cited by Ld. C.
Talbot. Cases in Equ. 210. Trin. 1736. in case of *STAPLETON v. COLVILLE*.

* *Devise of particular lands* shall not have the benefit of the personal estate, but *bres factus* of
the whole estate shall. Per Rawlinson Commissioner. Ch. Prec. 3. Hill. 1683. in case of *GOWER*
v. MEAD.

† The personal estate though devised shall pay off a mortgage, though there is *no covenant for*
payment in the mortgage. Ch. Prec. 61. Trin. 1696. *MEYNEL v. HOWARD*.—Unless there are
words of exemption. Per Ld. Cowper. Ch. Prec. 477. Mich. 1717. *HOWELL v. PRICE*.—2
Vern. 702. S. C.

13. Land is devised to A. and his wife for life, and after their
decease to such of their children as should be living at the death
of the survivor of them, and their heirs equally, he, the said A.
paying 40 l. to B. &c. at a certain time. This 40 l. is a charge
upon all the estates. Ch. Prec. 27. pl. 29. Trin. 1691. *Sadd v.*
Carter.

14. A. devised 3000 l. a-piece to his daughters at their respec-
tive ages of 18, and appointed lands to be sold by trustees for that
purpose; then he devised several specifick legacies to his wife and
others, which he appointed to be paid out of his personal estate,
and bequeathed all the rest and residue of his goods and chattles to
his wife, *not disposed of by his will*, and which shall not be disposed
of by any codicil thereunto annexed, to the end his wife should pay
all such legacies, &c. as he had appointed to be paid out of his personal
estate, and made his wife executrix, and died. The land fell short,
but the personal estate was more than sufficient to pay all debts and
legacies. Decreed that the personal estate shall be liable so far as
the lands fall short. N. Ch. R. 203. Pasch. 1691. *Strode v.*
Ellis.

15. If a man by his will devises his lands to J. S. and desires that
the said J. S. should pay his debts, or if it be the said J. S. paying
his debts, or if immediately after the devise of his lands, he does appoint
or desire that his debts should be paid, or if he useth any expression in
the will whereby it appears that he had any intent to charge his lands
with his debts, in such case his lands will stand charged. But in
the case at bar, where the testator had in the beginning of his will
said, that he desired that all his just debts should be paid; and after-
wards in the said will he gave several legacies, and devised lands; [437]
it was held that this devisee was not charged with the payment
of the debts; for if that should be so, the debts of every tes-
tator would be charged upon his lands, for there are few wills
but have some such expression, whereby the testator desires his
debts to be paid. 2 Freem. Rep. 192. pl. (269. b.) Mich. 1693.
Anon.

16. Devise of lands after debts paid, (and then says, my debts
are only these contained in the schedule.) Devisor afterwards con-

tracts *new debts*. The payment of the first debts is what is required by the will. 3 Lev. 433. Mich. 7 W. 3. C. B. Lodding-ton v. Kime.

17. Where lands were devised for payment of debts and legacies, the debts being such as had no lien upon the land, as debts by simple contract, &c. the debts should have no preference; but if there be not sufficient to pay all, they shall be paid in proportion, although it was otherwise held in the Lord Nottingham's time, who used always to say, that *a man ought to be just before he was bountiful*; and so the course of equity since that time seems to be settled. 2 Freem. Rep. 270. pl. 339. Trin. 1703. cited by Dobbins as a case now settled upon consideration had of all the former cases by the Ld. Leeper, in a cause of Herbert v. Herbert.

18. A. seized of lands in fee bequeaths 1000l. to J. S. and de-
vises the lands to B. and C. for their lives, remainder to D. in tail,
remainder over in tail, &c. *Provided that my executrices and executor
and tenants in tail shall pay the said sum of 1000l. within 6 months
after my death, and makes B. C. and D. executors.* The personal
estate was not sufficient to pay the 1000l. Ld. Cowper decreed
that the interest from the time the 1000l. became due be paid by
B. and C. and they to pay the third of the 1000l. and D. the two
other thirds, and for that purpose B. C. and D. were to join in com-
mon recovery to dock the estate tail and remainders, and so make a
security for raising the 1000l. Ch. Prec. 288. pl. 228. Hill. 1709.
Jones v. Selby.

19. Bill by the heir at law against the executors, to have an ac-
count of the personal estate of the testator, and that it might be ap-
plied in exoneration of the real estate devised to trustees to be sold
for payment of debts and legacies.

Waife, by his will, devises several lands to trustees to be sold for
payment of his debts and legacies, and devises all the residue of his
personal estate to his wife, and gives her also 600l. out of the
money to be raised by sale of the trust estate, and makes her exe-
cutrix.

Harcourt C. said, here is not only a devise over of the residue of
his personal estate to his executrix, but he gives her further the sum
of 600l. out of the real estate, so that he did not think the residue
of his personal estate sufficient for her, but gave her 600l. out of
his real estate, which is the strongest presumption imaginable of
the intent of the testator, that his wife should have residue of his
personal estate, and this makes it differ from the case of GARRO-
WAY AND CHRIST'S HOSPITAL, for there was no devise unto
his executors out of his real estate.

Bill dismiss quoad account of his personal estate. MS. Rep.
Mich. 12 Ann. Canc. Waife v. Whitfield.

20. A. devised his real estate to his son for life, remainder to his
first, &c. sons in tail, with remainder over, and by the same will
devised specifically a leasehold estate to his daughter, and made his son
executor. Assets fell short to pay debts. Per Ld. Chancellor the
deficiency is to be born equally in proportion to the value of each
estate. The fee-simple estate devised to the son being liable to
debts

In this case
an annuity
was devised
out of the
leasehold
to one
grandson,
and Ld. C.

debts by specialty by the statute against fraudulent devises, and the leasehold, * though specifically devised, is liable to debts, and both being devised, the intention of the testator stands equally between the devisees, and both estates being liable each ought to contribute its proportion. 2 Vern. 756. Hill. 1717. Short v. Long.

Cowper held, that the annuity was as much a specific devise, as if it had been of the

term itself. 2dly, that a specifick devise of a term is as much a specifick devise as a devise of lands in fee. 3dly, that since the statute of fraudulent devises, lands in fee are equally subject to debts by specialty in the hands of the devisee, as leases in the hands of the executor or devisee are to debts by simple contract at common law. Wms's Rep. 403. Hill. 1717. Long v. Short.

But if the devise had been of all the rest of the testator's lands, this had been a residuary and not a specifick devise, and the person taking thereby, should not have come in till after the debts by specialty, or otherwise, had been paid out of his inheritance. Wms's Rep. 403. Hill. 1717. Long v. Short.

21. A. by will gave several legacies, and then devised her lands to Sir H. M. her nephew and heir at law, but charged with payment of her legacies abovementioned, and made Sir H. M. executor. Afterwards upon a considerable personal estate coming to A. by the death of her mother, she by a codicil gave several further legacies to the same and other legatees, but the codicil said nothing as to charging the land, and it was not attested by any witness, and so, as was admitted, could charge no land, and both real and personal estate were deficient to pay the legacies charged by the will and codicil. Whereupon the Master of the Rolls decreed, that the personal estate being not sufficient to pay the legacies both by the will and codicil, and the real estate being liable to those by the will, but not to the other, the estate should be so marshalled that as far as possible the whole will might take effect, and decreed that the legacies by the will to be a charge on the real estate, and if that should be deficient, they must, as to the surplus, come in average with the legatees in the codicil, to be paid out of the personal estate; and that the land be forthwith sold to prevent a greater deficiency, but that the specifick legatees must all be paid, and not abate in proportion; but that some charities devised by the will, though preferred by the civil law, yet ought to abate in proportion; for they were but legacies. Wms's Rep. 421. Pasch. 1718. Masters v. Sir Harcourt Masters.

22. A. was seised in fee of the manors of D. and S. and by will gave D. to B. and S. to C. and charged all his real estate with payment of his debts. Afterwards A. mortgaged D. for 4000 l. B. shall compel C. to contribute to the discharge of the mortgage of D. But if the will is avoided so as the co-heirs of A. become intitled to both manors, so that they come into one hand, the right of contribution is at an end; for a man cannot contribute to himself, and the right of contribution, as it was given by the will, was in force only while the party claimed under the will, and not where the demand was set up in defiance thereof. Wms's Rep. 505. &c. 521. Mich. 1718. Carter v. Bernardiston.

23. A pecuniary legatee shall never charge a specifick devisee of lands, even though the lands were specifically devised to the heir at law.

But if the lands had been left to law.

descend to the heir at law it would be otherwise. Per Lord Macclesfield. Ch. Prec. 540. cites 2 Salk. 416. *Hern v. Meyrick*.
 Per Lord Macclesfield. Ch. Prec. 540. Mich. 1720. in case of *Chitton v. Birt*.

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24. *A. bound himself and his heirs, and after devised his lands to B. for life, remainder to the first, &c. sons of B. in tail male, remainder over; with a power to B. to lease for one, two, or three lives, at the old rents, which were very small and conventional rents, the lands lying in the west of England. B. took the profits, and raised considerable sums by fines on leases. On a bill by the bond creditors the Master of the Rolls decreed the personal estate to be first accounted for, and then B. to account for the rents and profits of the lands. Ld. C. Macclesfield on appeal held it sufficient that B. keep down the interest, and that as A. died seised of some lands let for lives at conventional-rents and other at rack-rents, he directed, first, the sale of the lands let at rack-rents, and next, so much as is requisite out of the life-lands, and to account for the fines of such of those lands as shall be sold, to be taken as part of the purchase-money; but if the lands at rack-rent be sufficient, then B. not to account for the fines. 2 Wms's Rep. 234. Trin. 1724. Manaton v. Manaton.*

25. As for concerning my estate with which God hath blessed me, I give as followeth, *imprimis, I will that all my debts and funeral charges be paid and satisfied, and then makes a particular disposition of the estate. This was decreed no charge, as it would be, when testator says, I will my debts be paid in first place, or where he gives away the estate after payment of debts and legacies; for here was a clause in the will, that after payment of legacies and funeral charges, the overplus was to go to such and such uses, which declare the intention to be that the same was to answer only legacies and funeral charges, and not debts. Per Master of the Rolls. Trin. 9 Geo. Parker v. Wilcox.*

26. *A. devised one third part of all his estate whatsoever to B. his widow, and devised to C. and his heirs two thirds of all his real and personal estate, upon condition to pay his debts. The Judges and Master of the Rolls (it being a cause in the Council-Chamber) after taking time to consider of it, and having met together, all agreed that B. the widow should have her thirds not liable to the debts, they being by the express words of the will fixed upon the other two thirds; and upon this point were cited D. 59. b. 164. a. Goldsb. 149. 2 Wms's Rep. 337. Hill. 1725. Chester v. Painter.*

27. *A. devised lands in G. to J. S. at 21, subject to the incumbrances thereon (they being then in mortgage) and ordered the rents and profits during the infancy of J. S. to be paid to her father for her sole use, and devised other lands to trustees for payment of his debts. The Master of the Rolls held, that the devise of other lands for payment of debts must intend all his debts, and consequently the mortgage of G. is part of those debts, and the profits being devised to the sole use of J. S. during her infancy, makes it*

so much the stronger. 2 Wms's Rep. 386. Mich. 1726. Serle v. St. Eloy.

28. A. seised of lands in fee, and possessed of a personal estate, having children, and being indebted, gave legacies by his will, and directs them to be paid out of his real estate, and gave his personal estate to his children. The Master of the Rolls held, that if the legacies had been only charged upon the real estate, yet the personal estate should have been applied first to pay them, and so it should have been against a residuary legatee; but in this case the real estate being the fund appointed, and the whole personal estate given away by the will, therefore the legacies must be paid out of the real estate only; but the debt shall still be paid out of the personal estate, the will not ordering the debts to be paid out of the real. 2 Wms's Rep. 366. Trin. 1726. Heath v. Heath.

29. A will begins, *As to all my worldly estate, my debts being first paid, I give, &c.* the real estate is liable to the debts, nothing being devised till the debts are paid. 3 Wms's Rep. 91. Hill. 1730. Harris v. Ingledew.

30. *All my personal estate, of what nature, kind, or quality soever, I give to my sister A. whom I make my executrix; and all my real estate, of what kind, nature, or quality soever, I give unto my sons B. and C. chargeable with my debts.* Arg. Cases in Equ. in Ld. Talbot's time 204. * cites it as held at the Rolls about 1731 or 1732, and after by Lord C. King, in the case of BROMHALL v. WILBRAMHAM, that the personal estate should be first liable.

Ibid. 209. S. C. cited by Ld. C. Talbot, who said, that in that case the real and personal estates were

pretty much of the same value, and the debts must have exhausted the one or the other fund; so that had the judgment of the court been otherwise, the man's children would have been left without any provision.

* [440]

31. A devise was as follows, viz. *For the just and true performance of this my last will, and for the payment of all my debts, I give and devise all my real estate; and as to the personal estate, which at the time of my death I shall be possessed of and intitled unto, I give the same unto my executor and executrix herein named, to defray my funeral charges and expences; and if my personal estate shall fall short to discharge the same, then the remainder to be paid to my executors out of the first rents and profits of my real estate as they shall become due after my decease, until payment be made of all my legacies, debts, and funeral expences as aforesaid; and if there be any surplus of my personal estate, that then my executors pay the same to my dear and loving wife.* Arg. cases in Equ. in Lord Talbot's time 207. cites it as the case of the ATTORNEY GENERAL v. BARKHAM about the year 1734, and that it was held, that the personal estate should go to the wife, discharged from the payment of debts.

Ibid. 210. S. C. cited by Ld. C. Talbot, who said, that in this case the testator had laid the charge upon the real estate, and then taking up his personal estate, mentions particular things which he

charges it with; so that the surplus there meant must be the surplus after the particular charges which he had there specified; and therefore this case being very particular must stand upon his own bottom and reason, and cannot be compared to the case of Stapleton v. Colville.

32. One devises all his real estate in trust to pay all his debts; the bond creditors recover part of their debts out of the personal estate; the

simple contract debts shall be equally paid out of the real estate with the bond debts, and the bond creditors shall have nothing thereout until the simple contract creditors shall have received as much from the same as shall make them equal in payment with the bond creditors; per Ld. Chancellor. 3 Wms's Rep. 323. Trin. 1734. in case of Haslewood v. Pope.

Ibid. 209. Ld. Chancellor said that the opinion of the court in the case of Harwood v. Child, was founded upon the complexion of the will, which being taken together, manifested the intent to be that the daughter should take the personal estate liable

33. The words of a will was; *I devise all my manors to A. and B. and their heirs in trust, that they and their heirs out of the rents and profits, or by lease, or mortgage, or sale thereof, or of any part thereof, shall raise so much money as I shall owe at my death; and after payment of my debts and reimbursing themselves, upon further trust that they and their heirs shall stand seised of such part of the premises, as shall remain unsold, to and for such persons and uses as the manor of C. is already settled; and if any money remains after payment of my debts, it shall be paid to my daughter, and such as are intitled to the said manor by the limitation aforesaid.* Testator, before the making of his will had given the manor of C. to his daughter in tail, with remainder to his nephew; and then gave all his personal estate of what nature or quality soever to his daughter, whom he made executrix. Arg. cases in Equ. in Lord Talbot's time 204. in case of Stapleton v. Colville, says it was held by Lord C. Talbot, August 13, 1734, in case of HAREWOOD v. CHILD, that notwithstanding this express devise to the trustees, the personal estate should be first applied in discharge of the real.

to the payment of his debts *the herself being devisee of the whole*; and that it would be absurd to imagine the testator to have intended his personal estate to be exempted from payment of his debts, when he had expressly provided that the surplus of the produce of what should be raised out of the real estate should go to the very same person who was devisee in tail of the real estate.

[441] 34. A. devised his lands to M. his wife for life, [charged and] chargeable with two annuities for the lives of W. R. and T. S. and with a legacy of 1000 l. and gave M. a power by mortgage or sale of any part of the inheritance to raise money sufficient to discharge the debts he should owe at his death; and then reciting the great satisfaction he had of his estate's having continued so long in his family, and the great desire he had to perpetuate, as far as he could, his name and estate, he devised all his real estate after M's death to B. his nephew for life, remainder to his first, &c. sons in tail, &c. upon condition of taking and using his name and arms for ever. And in the close of his will he gives all his goods, chattels, and personal estate to M. and makes her sole executrix. Ld. C. Talbot observed, that after the gift of the annuity and legacies wherewith he charged his real estate, he gives his real estate to his wife for life; and said, that though it does not necessarily follow that the coupling both together shews he intended both to be payable out of one and the same fund, the personal estate being the proper fund for debts, though no provision had been made by the testator; but that the annuities having none but what is particularly provided for them, yet that must have some weight; that he did not think that the using the words (*charged or chargeable*) will make any difference since they are used indifferently) and that then coming the power given to the wife, it seemed to him clearly

clearly to manifest his intent of her taking what he gave her by his will to her own use; for his intent being to perpetuate his estate, he thought it not to be supposed, that after having given her the whole power over his personal estate by making her executrix, he would likewise impower her to dispose of so much of the inheritance, and consequently of defeating the devise (not of so much as the personal estate should prove deficient, but) of what should be necessary for the payment of his debts; that his intent seems clear to give her this power of disposing of so much of the inheritance as would satisfy his debts, in order to secure her the full enjoyment of her estate for life, and of the personal estate free from all charges whatsoever; and so affirmed a decree before made at the Rolls in behalf of the wife. Cases in Equ. in Ld. Talbot's time 202. Trin. 1736. Stapleton v. Colville.

(A. e) Specifick Legacy. What is. And liable to Contribution or Abatement, in what Cases.

1. *LEGACY* devised to be paid out of a debt of a greater value, is in nature of a specifick legacy, and not subject to abatement to answer other legacies, and in default of payment decreed the executor to permit the plaintiff to sue the debt in the executor's name, and the executor to be protected by this court. Fin. 303. Trin. 29 Car. 2. Smalbone v. Brace and Crompton.

2. A. seised of lands and houses in fee, by will in writing devised to B. *lands of 100 l. per. ann. to be set out by his executor*, and 5000 l. to C. and 300 l. to D. per Finch C. this is not a specifick legacy but *quantitatis*, and therefore if not sufficient each shall bear his share of the loss. 2 Ch. Cases 25. Pasch. 32 Car. 2. v. Wilkinfon.

3. S. was indebted to his mother for *arrears of an annuity of 500 l. per annum 3000 l.* and makes her his executrix, and by will devises as much land to her as is *worth 2000 l.* and devises his *jewels to his wife*; the question before North Ld. Keeper was, whether the mother, being executrix, may retain the jewels towards payment of the debt, or else, whether the debt shall be included in the *2000 l. worth of land, the personal estate not being sufficient to pay the debt*? And my Ld. Keeper held, that inasmuch as the personal estate was not sufficient, that the land shall go in discharge of the debt, and the *specifick legacy shall not be lost*; but if there were not enough besides the legacy to pay the debt, then that she might retain. Skin. 158. Hill. 35 & 36 Car. 2. Speak v. Pedley.

4. A man having pawned a jewel for a sum of money, *devised the jewel to B. and made C. his executor, and gave him all his goods, chattles, and personal estate after his debts and legacies paid*; and the question

question was, whether B. should pay *the debt for which the jewel was pawned*, or whether it should be paid out of the personal estate by the executor? and decreed, that it *should be paid out of the personal estate*, and that the legatee should have the jewel discharged of it. This decree was afterwards affirmed in the House of Lords, ut dict'. fuit per Mr. Crawford, who was of counsel in it, a Scotch cause. 2 Freem. Rep. 272. pl. 341. Hill. 1703. Anon.

S. C. cited
Ibid. tit.
Legacies,
says, that
all the spe-
cifick lega-
cies shall
contribute.

5. An estate being considerably mortgaged, was devised to A. and several specifick legacies were left to others. The overplus is not sufficient to discharge the debt. Quære, whether the specifick legacies shall contribute towards discharging the mortgage before the mortgaged premisses shall be affected? for the covenant to pay the money makes it a personal estate, and the *real estate shall never be put in average with the personal*. MS. Tab. tit. Heir cites 1706. Warner v. Hayes.

Abt. Equ.
Cases 143.
pl. 11. S. C.
cited out of
2 Salk.

6. A. seised in fee, and indebted by bonds, by will gives legacies to children (whom he otherwise provided for before) and devised his land to the eldest son in tail. The eldest son being executor, pays the bond with the personal estate; if the land had descended the legacies might have been relieved out of the real estate; but since A. had devised the lands, it was resolved they ought to be exempted; for it was as much A's intention that the devisee should have this land, as the others should have the legacies; and a specifick legacy is never broke in upon in order to make good a pecuniary one; and this case is out of the statute against fraudulent devises, because the debts are paid, and the children being otherwise provided for, are not in the nature of creditors. This was on an appeal from the Rolls, where the Master held, that the real and personal estate should be so charged that both the debts and legacies should be paid. 2 Salk. 416. pl. 3. per Lord Harcourt in Canc. Hern v. Merick.

In this case
Ld. Chan.
Parker said,
that he
could not
come into
the resolu-
tion of Ld.
Cowper in
the case of
Burridge v.
Bradyl.
Ibid. 541.

7. A. bequeathed several pecuniary legacies, and (int' al') gave 1500 l. to B. her eldest son in trust to lay it out in a purchase of lands in fee, and to grant a rent-charge of 50 l. a year thereout to M. her daughter. But if B. should refuse, or neglect to lay out 1500 l. in a purchase, then he to have but 500 l. of the 1500 l. and the remaining 1000 l. to be laid out in the purchase of an annuity as far as it would go, for the separate use of M. There being a deficiency of assets, the question was, if the 1500 l. legacy, or at least the 50 l. annuity, should abate in proportion? Ld. Ch. Parker agreed, that this 1500 l. should be taken as land, but said, that the legatee cannot say he has a right to the 1500 l. in specie, and that a specifick legacy is where by the assent of the executor the property of the legacy would vest. And if upon a supposition that 1500 l. of testator's money was lying on the table, the legatee cannot say that he had a right to this very money in specie, it is then no specifick legacy; and that by the will's saying, that if the son refuse or neglect to make this purchase, then he is to have but 500 l. and M. the remaining 1000 l. he looked upon M. as a legatee for 1000 l. which is to abate in proportion, and as far as it will go to be laid out in an annuity for M. the

the plaintiff for her life, and for her separate use. Wms's Rep. 539. Trin. 1719. Hinton v. Pinke.

8. A seized of an estate in fee, and also of a term for years, mortgaged his fee-simple lands for 500 l. and after devised his lands in fee to B. and his leasehold estate to C. leaving debts which would exhaust all his personal estate except the leasehold given to C. The question was, whether there being a covenant for payment of the mortgage money as usual the leasehold premises devised to C. should be liable to discharge the mortgage? it was decreed by the Master of the Rolls, that both these estates being specifically devised, B. must take the fee-simple estate *cum onere*, as probably was intended, and not disappoint the legacy to C. by laying on it the debt of 500 l. and said that by this construction each devise would take effect, and that this resolution did not in the least interfere with that of CLIFTON v. BIRT, because in the later there was no mortgage. Hill. 1720. Wms's Rep. 693. Oneal v. Meade.

9. A bequeathed several pecuniary legacies, and then devises lands to trustees and their heirs in trust, that they do and shall by mortgage or sale pay and satisfy his debts, and the said legacies and funeral expences. Then he bequeaths goods, &c. in such an house to another; and then says, *all the rest and residue of my personal estate* I give and devise to my wife, whom I make sole executor. Per Cur. this is in nature of a specifick legacy to the wife, exempt from debts and legacies and funerals; and it is to be understood the residue of what he had not before particularly devised, and not the residue after debts, &c. paid. Abr. Eq. Cases 271. pl. 13. Hill. 1724. at the Rolls. Adams v. Meyrick.

(B. c) Specifick Legacies.

Defect therein made good or Not.

1. IF A. bequeath to J. S. *that which is another man's*, and whereto the testator had no right, then A's executor ought to buy it and give it to J. S. or else *satisfy the legatee to the full value*, and this not only by the civil, but also by the canon law, and in foro conscientiae. Wentw. Off. of Executors 251, 252. cites Sum. Silv. 286.

2. If A. bequeath to B. *his black horse*, and after sells him and dies, the executor is bound to answer the value thereof to B. Wentw. Off. of Executors 252. cites Sum. Silv. 286.

3. And if after such sale A. buys another black horse; this latter horse shall pass to B. (saith the same book) except it can be proved that A. sold the former on purpose to revoke his will touching that bequest. Wentw. Off. of Executors 252.

4. If A. having a moiety of Black-Acre, or of a stack of corn, &c. gives the whole, so as the words plainly reach to more than his moiety, the executor must buy out the other's part, or give him the value. Wentw. Off. of Executors 252. cites Sum. Silv. 286.

5. But

5. *But if the words are only general, so as they may be reasonably satisfied with the testator's part, no supply shall be made.* Ibid.

* 6. *So if pawnee of goods bequeath them, it shall be construed to extend them no further than his own right.* Ibid.

7. A freeman of London devised a lease for years to A. and books to B. A moiety is evicted by the widow by the custom of London. They shall not have satisfaction for what is so evicted. For they can have no more than what the testator devised, and the widow by the custom (there being no child) was intitled to a moiety; so that the testator could devise but one moiety, and nothing more passed by his will, and they must be contented with a moiety. 2 Vern. 110. pl. 107. Mich. 1689. Webb v. Webb.

8. Devise to his wife of *all his personal estate at D.* This is a specifick legacy. 2 Vern. 688. Mich. 1714. Sayer v. Sayer.

Vern. 688.

S. C.—

G. Equ. R.

87. S. C.

9. The case may so happen that a specifick legacy shall be chargeable with the payment of a pecuniary legacy, as if a man devises his personal estate at D. to B. and his personal estate at E. to C. and then gives 300 l. out of his personal estate, and dies, leaving no other personal estate than at D. and E. the 300 l. must come out of the estate at large at both places. Per Ld. Chancellor. Ch. Prec. 393. Mich. 1714. in the case of Sayer v. Sayer.

G. Equ. R.

88. S. C.

10. *But pecuniary legatees shall have no aid of the specifick legates, especially if the pecuniary legacies are devised generally and at large, without saying out of his personal estate, or out of all his personal estate whatsoever, or words to that effect.* Chan. Prec. 393. Mich. 1714. Sayer v. Sayer.

11. A. devised 6000 l. *S. S. annuities to B. C. and D. to be laid out in land and settled on B. for life, &c.* And by codicil three days after, taking notice of this devise gives 1200 l. to be laid out in land to the same uses and makes B. executor. A. left a very considerable personal estate but had only 5360 l. in annuities at the time of the will made. The question was if it should be made as to 6000 l. It was decreed at the Rolls that nothing passed more than A. had in S. S. annuities. And Ld. Chancellor affirmed the decree. Cases in Equ. in Ld. Talbot's time 152. Mich. 1735. Ashton v. Ashton.

12. Specifick legacies, as in some respects they have the advantage, so in others they have the disadvantage, of pecuniary ones, as suppose they shall have been *lost or aliened* by the testator in his lifetime, they must then fail in toto. 3 Wms's Rep. 385. pl. 106. Mich. 1735. Ashton v. Ashton.

(C. c) Residuary Legatees who, and what shall go to them, or where the Part of one shall survive to the others.

1. A. Seised of divers lands devised *part called Gages to the erecting of a school*; another part to B. in fee, and all *his other lands to C. in fee*. The devise of *Gages was void*, because too general *no person being named*, and it was likewise held, that it passed by the general devise to C. and yet that was not the meaning of the devisor; but because such devise stands not with the law, it shall be rejected. Arg. Le. 251. pl. 339. Trin. 32 Eliz. B. R. cited as the case of Bennet v. French.

Cited Arg. 8 Mod. 223. — This case in Leonard's reports ought to be well considered; per Cur. 8 Mod. 224.

2. Where executor dies *administration de bonis non* shall be granted to residuary legatee and not to the next of kin. Vent. 217. Trin. 24 Car. 2. B. R. Thomas v. Butler.

3. A. has B. C. & D. his sons and M. his daughter. A. makes *B. his son and a stranger his executors*; but on publishing the will declares the stranger to be only executor in trust for the children, and to take no benefit by it, *but the estate to go to the children* and died; C. and D. died. B. died, and left the stranger his executor; M. sues the stranger for 500 l. legacy left to D. by A. she having taken administration to D. and also claims the residuary estate of A. But decreed that B. was well intitled to the residuum, and that the trust in the stranger should be construed as is most consistent with the will in writing and dismissed M's Bill 2 Ch. R. 99. 26 Car. 2. Bowyer v. Bird.

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4. Lessee for years subject to a trust devised residuum bonorum; the estate would but pay the debts if all sold. He pays the debts and *renews the lease for a further term*, it being a church lease, and offered to account if any profits would arise out of the old term. But by Ld. Keeper he shall account for the new lease as well as the old. 2 Ch. Cases 207. Mich. 27 Car. 2. Anon.

5. Devise of lands to his executors to be sold and thereout to retain their costs and charges and *to pay 500 l. to A. if he returns from beyond sea and the residue to B. A. died before testator*; per Wright Keeper, it is a *contingent devise*, and on a condition precedent which not happening, is, as if never given; but if it had been an *absolute devise* it would not have passed to the residuary legatee by the devise of the rest and residue, and dismissed the bill. 2 Vern. 394. Mich. 1700. Sprigg v. Sprigg.

6. It was admitted that on the devise of the residue of a *personal estate*, if a legatee was dead at the time of making the will, the residuary legatees shall not have the benefit of such legacy, and that it shall not fall into the residue, nothing being intended to pass by the devise but the residue after that and other legacies paid. 2 Vern. 395. Mich. 1700. in case of Sprigg v. Sprigg.

7. A.

It seems that this decree was reversed in the House of Lords upon the express words of exclusion Ch. Prec.

7. A. had *two children B. and C.* and then *his wife and he parted and she had two children more, viz. D. and E.* A. bequeathed to B. and C. considerable legacies, and to *D. & E. his wife's children* (as he called them, not owning them to be his) *10s. a-piece and no more*. Then A. devised legacies to his executors, but did not say that they were for care and pains. D. and E. shall come in for a share of the undisposed surplus. For the words of exclusion must be taken strictly. Ch. Prec. 169. Trin. 1701. *Vachel v. Jeffries*.

453. S. C. cited per Mr. Vernon as decreed by the Master of the Rolls accordingly, but in the House of Lords upon an appeal, though the other children were allowed their share of the surplus, yet D. and E. were excluded from any share. Wms's Rep. 548. Trin. 1719.

8. A. gives 500l. to his executors on trust to pay annuities to B. and C. for their lives, which annuities far exceeded the interest of the 500l. and gives the surplus of his estate to D. and E. the *annuitants* being dead, the *unexhausted remainder* of the 500l. shall go to residuary legatees and not to the executors. Vern. 426. pl. 400. Hill. 1686. *Cock v. Berrish*.

Vern. 412. S. C. but takes notice that a particular legacy was devised to the heir likewise.

9. *Devise of 100l. to A. whom he makes executor yet notwithstanding the executor shall have the residue it not being devised over.* 2 Chan. Cases 187. Mich. 2 Jac. 2. *Canning v. Hicks*.

[446] 10. *Devise of the residuum of his real and personal estate to his four daughters their heirs, executors and administrators. One of the daughters dies in the life-time of the testator; her share of the residuum shall go to the three surviving daughters as undisposed of.* Per Parker C. MS. Rep. Trin. 7 Geo. in Canc. *Backwell v. Dry*.

11. Though Chancery will *marshall assets* for the sake of paying debts, yet it will never do it *in favour of a residuary legatee* and in prejudice of the heir at law. Arg. 10. Mod. 477. Pasch. 8 Geo. 1.

12. J. S. seised of several lands in fee devised all his said lands to *A. B. C. D. and E. and to their heirs in common; D. died before J. S.* who by another clause in the will devised *all other his real and personal estate not already disposed to L. & M. and their heirs, executor, &c.* J. S. died without making any other disposition of the part of D. other than by his said will as aforesaid, whether the same shall descend to the heir at law of J. S. as not disposed of by him by D's dying before him, or whether it shall pass to L. and M. who were made residuary legatees by a latter clause in the will, viz. all the rest, as an estate not before disposed by testator, no judgment was given. 8 Mod. 123. Pasch. 9 Geo. 1724. *Goodwright v. Opie*.

8 Mod. 222. Hill. 10 Geo. in the case of *Wright v. Horne*. S.P. and seems to be S. C.

13. The testator devised *all that his messuage and tenement in E. to F. C. and his heirs, and all the rest and residue of his messuages, lands, tenements, and hereditaments, in E. G. and elsewhere to J. L. his heirs and assigns for ever; after the making this will, the aforesaid F. C. the devisee, died in the life-time of the testator, so that this*
8 became

became a lapsed devise by his death ; and then the sole question in ejectment was, whether this latter clause of the will would carry over the lapsed devise to J. L. the residuary devisee or whether it should descend to the heir at law of the testator ? The court held, that the devise of all the rest and residue of my messuages, lands, &c. did not convey what was expressly devised before ; for wills must be construed from the intent of the testator at the time of making the will, which appears to be to give his whole estate to F. C. and his heirs, in that messuage ; and at the time of the will made, he had no rest and residue left in that house, and the devise to C. being void, the house will go to the heir at law, and not to J. L. Fortescue's Rep. 182, 183. Pasch. 11 Geo. C. B. Wright v. Hall.

14. Where a man *charged his lands with the payment of his debts, and gave some specifick legacies, together with the rest of his personal estate to his brother ;* in which case so far as the specifick legacies would be exempt from the debts, as betwixt the devisee of the land and the specifick legatee ; so the court declared, they could not sever the specifick legacies from the rest of the personal estate, and since the testator equally intended that the residuary legatee should have the rest of his personal estate, as the specifick legacies, therefore *all the personal estate was held to be exempt from the debts.* 3 Wms's Rep. 325. Trin. 1734. Halletwood v. Pope.

(D. e) Uncertain.

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In what Cases Legatee may make Election ; and How.

1. **I** f a man bequeaths *one of his horses* or cows, not naming which, to J. S. he is to choose which he will, so it be not the best of all, faith the civil law. And perhaps the mention of that exception grows out of respect to the heriot which the lord should have, or the mortuary which the parson should have. Wentw. Off. of Executors 251.

(E. e) Indirect.

And who shall take.

1. **I** Will that A. shall have *the use of my lease, if he shall so long live, during his life, he paying certain legacies, &c. and after his decease I devise the profits thereof to B. the residue of the term, together with the lease in manner and form as B. should have it.* Per Cur. this shall go to B. the last devisee, and in manner and form shall go to the payment of the legacies, which is but limitation ; and per omnes it is a very strong case, and *together with the lease*, are very strong

Hct. 163.
Rawling v.
Rawling.
S. C.

strong words. Litt. R. 348. Mich. 6 Car. C. B. Pawling v. Pawling.

(F. c) In what Cases a Devise of Chattles with Remainder is Good or not.

Br. Done, sec. pl. 57. cites S. C. But M. 37. H. 8. If the devise for life gives or sell the chat-
th, and dies, be in re-
mainder has no remedy;
but if he die before gift or sale, he in remain-
der shall have it; but it seems if it be forfeited in his life, he in re-
mainder has no re-
medy.

1. I N trespass. *J. was possessed of a garden, and made A. and B. his executors, and devised the garden to B. the one of the exe- cutors to have and use for term of his life, the remainder to the said A. the other executor to have and use for term of his life, the remainder to the next of kin of B. for ever, and died. The devise with the remainder supra is good, per Davers; for the executors have no property but an occupation; and see in the end they pleaded the devise to B. to have the occupation for term of his life, and after his decease to A. in the same manner, and after his decease to be disposed of by his executors to the use of the next of kin of B. for ever; so note that the property was not devised but the occupation, and it was agreed in the time of H. 8. and E. 6. to be good law that the occupation may so remain; but if the thing itself was de- vised to the use the remainder is void; for a gift or devise of a chat- tle for one hour is for ever, and the donee or devisee may give, sell and dispose of it, and the remainder depending upon it is void; Quod Nota for a very good diversity. Br. Devise, pl. 13. cites * 37 H. 6. 30.*

* Godolph. Orph. Leg. 407. cites S. C.

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2. And. 2 E. 6. where a man devised that W. N. shall have the occupation of his plate or term during his life; and if he dies within the term, that it shall remain to J. S. this is good; for the first has only the occupation, and the other after him shall have property. Ibid.

3. F. devised his land to N. F. in tail with divers remainders over, and in the same devise he devised divers jewels and pieces of plate, viz. the use of them to the said N. F. and the heirs males of his body. In this case it was the opinion of the court, that the said N. had no property in the said plate, but only the use and occupation; per Dyer. Ow. 33. Trin. 7 Eliz. Fitz-James's case.

5. The husband devised his goods to his wife for life, and after her decease to T. S. who sued in the court of equity of the Marchers in Wales to secure his interest in remainder; but a prohibition was granted, because a devise of the goods themselves, with a remainder over, is void, but not where the use and occupation of them is first devised. March. 106. Trin. 17 Car. C. B. Anon.

6. Possibility of the remainder of a personal estate by deed and also by will is void in law, and a bill for security of such estate de- murred to, and demurrer allowed. Chan. Rep. 260. 17 Car. 2. Hart v. Hart.

7. I give the use of all my paintings, books, and other rarities to my wife

wife for life; and if she be with child of a son, then after her decease the same paintings, &c. shall be left remaining and come to the same son; but if my wife be not with child of a son, or if the same son shall die without issue male of his body, then my will is, that all the said paintings, &c. after the decease of my said wife, and the death of such son as my wife is now with child of, shall come and remain to the use of T. V. the father, of which my will is, that the said T. V. shall have only the use during his life, and that he leave them to my kinsman T. V. his son, and that he shall as far as in him lies so dispose thereof to him that shall, by God's blessing, next succeed him in my manors, &c. that they remain as an heir-loom, and go and remain to such person and persons as shall inherit my said manors, &c. who I desire may prove lovers of learning, ingenuity and arts. Lord Chancellor declared that the use of the afore said rarities was well settled by the will of the testator upon T. V. the son, after the death of the wife; and the judges were of opinion, that the father dying in the life-time of the devisee, and the wife being not with child of a son, so as the contingency upon which the limitation was made never happening, that the devise to the son was an absolute devise and good in law, and the wife ought to have the use only during her life, and she to be examined on interrogatories for a discovery of the rarities and matters so devised, and an inventory to be made, &c. Chan. Cases 129. 131. Trin. 21 Car. 2. Vachel v. Vachel.

8. A devise of personal estate to one for life, and after to her children, and if they have no issue, the remainder over is a void devise as to the remainder. 2 Ch. Rep. 65. 23 Car. 2. Boucher v. Antram.

S. C. cited
2 Vern. 59.
& G. Eq.
R. 75.
Brown v.
Pitman.—

2 Ch. Rep. 384. 1 Jac. 2. Whitmore v. Weld. S. P.—But where a personal estate was devised to A. for life and after her death the yearly interest and produce thereof to be for the maintenance and education of such children as she should have by J. S. untill the son should be twenty-one and the daughter eighteen, who at such ripe five ages were to be paid their portions and for want of such issue to B. A. died without issue. Ld. C. King held that the words (for want of such issue) must be intended (for want of such children) and whether A. shall leave such children will be known at her death; if she should leave children, then they are to have the product for their maintenance until age, before which time they could not dispose of it by reason of their infancy if they had the absolute interest therein; but as soon as they come of age they are to have the entire property and therefore this is a good executory devise. 2 Wms's Rep. 421. Trin. 1727. Maddox v. Stains.—S. C. cited Gibb. 318. 319. as decreed at the Rolls and affirmed in Chancery and both decrees affirmed in the House of Lords.

9. Devise of a personal estate to A. (who was executor) during her life, and after her decease I give 400 l. a-piece to my four nieces. Decreed for the nieces. Fin. R. 116. Hill. 25 Car. 2. Catchmay v. Nicholas and Morgan.

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Wms's
Rep. 5. in a
note there
cites S. C.

10. A. devised 3000 l. to a daughter, and that the trustees out of the interest of the 3000 l. should pay for her maintenance 80 l. per ann. But if she died before 21 or marriage, then to go to such person as should enjoy his lands of inheritance according to his will. If the daughter dies within age unmarried, he that has the lands according to the will shall have the surplus of the interest above the 80 l. as well as the 3000 l. 2 Ch. R. 148. 30 Car. 2. Bourn v. Tint.

11. Devise of goods to J. S. for 11 years, and after the 11 years he gave the same to J. N. decreed the delivery of the goods accord-

2 Vern. 392.
Mich. 1696.
in case of

Hide v.
Parrot.
S. P.

Devise of
jewels and
plate to his
wife for

ing to the will, the 11 years being expired. 2 Ch. Rep. 137. 30 Car. 2. Jolly v. Wills.

12. *Devise of a personal estate in remainder after the death of J. S. is a void devise, and vests wholly in J. S. the being executrix.* 2 Chan. Rep. 151. 31 Car. 2. Warner v. Barsley.

life, and afterwards to his son, intends the use only to the wife, and decreed accordingly. N. Ch. R. 174. Mich. 1691. Sir Thomas Clarges's case.—S. P. 2 Vern. 59. Pasch. 1693. in case of Smith v. Clever, cites Rachel's case.—Ibid. 245. Mich. 1691. Clergis v. the Duchesse of Albe-marle. S. P.—2 Vern. 331. Mich. 1696. Hide v. Parrot. S. P. as to goods.—Decreed to pass. Wms's Rep. 1 to 6. Pasch. 1695. Per Ld. Somers. S. C.

A chattel in gross cannot be devised for life. But one may devise the use of a chattel in gross for life. Per Holt Ch. J. 12 Mod. 520. Pasch. 13 W. 3. Lord Peter v. Heneage.—So where testator devised his manor, &c. and all his goods and furniture to his wife, whom he made executrix, and by his will directed that his goods and furniture might be preserved for his heir, so that the children which she had by the plaintiff's father might enjoy the same. An inventory was ordered to be taken, and the wife to have the use for her life, and then to be delivered to the plaintiff's use and benefit. Wms's Rep. 6. in a note there, cites 28 May. 2 W. & M. Shirley v. Ferrers.

Mr. Vernon
said that the
reason a
devise over
of such per-
sonal estate
upon a life

13. *Goods devised to A. for life, and after her decease to the heir of B. B. dies, living A. The goods were decreed to him that was heir of B. at B's death, and not to him that was his heir at A's death.* Vern. 35. Hill. 1681. Danvers v. the Earl of Clarendon.

only, was good, because in construction of this court the first devisee had but the use of it, and not the intire property. Ch. Prec. 323. Hill. 1711. in case of Gibbs v. Bernardiston.

Arg. S. C.
cited Gibb.
320. says
the limita-
tion over
was held
void, not
because
of the re-
moteness
of the con-
tingency, but

14. *A. devised his personal estate to C. in trust for B. and the heirs of his body, and if B. die during his minority, and without issue, then to D. and makes B. (his son) executor, and C. executor in trust for B. during B's minority; B. lives to 18 and then dies without issue; this shall go to the executor of B. and not to D. Per Jeffries C. who said it was a trust vested in B. and the remainder over to D. was void.* Vern. 326. 347. Pasch. 1685. and Mich. 1685. Whitmore v. Weld.

because the first taker had the absolute interest.

15. *A. makes B. executor, and gives the surplus of his personal estate to B. but willed if B. died without issue it should go over to C. and that B. should give security for its going over accordingly, the devise over is void, but whether the directing a bond to be given does not alter the case.* Vern. 478. Mich. 1687. Deering v. Hanbury.

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16. *Goods were devised to one for life, the remainder over, and decreed good.* Arg. 2 Vern. 246. cites the case of Catesby v. Nicholls.

17. *A devise of goods to A. for life with remainder after the decease of A. to B; it is now clearly settled, that it is a good devise to B. and that B. may exhibit a bill against A. to compel him to give security that the goods shall be forth-coming at his decease; and is all one whether the goods or the use of the goods be devised for life.* 2 Freem. Rep. 206. pl. 280. Mich 1695. Anon.

18. *A. bequeathed all his household goods to his wife for life, and after to his son, it is a good devise over, and the same as if the devise had been only of the use of them for her life, and per Ld. Somers*

mers

mers it is a rule where personal chattles are devised for a limited time, it shall be intended the use of them only, and not the thing itself. 2 Vern. 331. pl. 316. Mich. 1696. Hide v. Parrot.

19. A man devises all his personal estate to his wife for life, and what she has left at the time of her death, it is my will, and I do desire her that it may be equally distributed betwixt my own kindred and her's. Testator died, and the widow married the defendant. This bill was brought by the relations to have an inventory taken of the testator's personal estate, and that security might be given that it should not be imbezelled, for that by his will the wife had only the use of the personal estate during life; if the words, what she has left, shall be construed to be by reason of goods that are bona peritura, or may be quite worn out with using. On the defendant's part it was said, that the estate left was so small that she could not live upon it without spending the stock. Master of the Rolls said, if it be so it may alter the case; therefore let the Master state the value of the personal estate, and then I will give further directions. Chan. Prec. 71, 72. pl. 64. Pasch. 1697. Cooper v. Williams.

20. A farmer devised his stock, (which consisting of corn, hay, cattle, &c.) to his wife for life, and after her death to the plaintiff; it was objected that no remainder can be limited over of such chattles as these, because the use of them is to spend and consume them; but the Master of the Rolls said, the devise over was good; but said, if any of the cattle were worn out in using, the defendant was not to be answerable for them; and if any were sold as useles, the defendant was only to answer the value of them at the time of the sale; and an accmpt was decreed to be taken accordingly. Abr. Equ. Cases 361. Mich. 1702. Hayle v. Burrodale.

21. A personal estate was devised to A. and in case she died without issue, then to B. Resolved that the devise over to B. is void, and the whole decreed to A. 2 Freem. Rep. 287. pl. (357. b.) Pasch. 1705. Anon.

22. A devise of a personal estate to J. S. and his issue, or to J. S. and if he died without issue, remainder over to another is void, and the whole interest vested in J. S. Ch. Prec. 323. Hill. 1711. Gibbs v. Barnardiston. Gibb. Equ. R. 79. S. C.

23. A remainder or devise over on a contingency to happen within the compass of a life, is a good devise or limitation over, even of a personal estate or of a sum of money, or chattle personal. Arg. 2 Vern. 760. pl. 662. Trin. 1718. in case of Pinbury v. Elkin. Ch. Prec. 483. S. C.

24. A. devises to H. his wife all his debts, goods, &c. Provided that if H. died without issue by him, he appointed that 80 l. should remain to his brother J. D. A dies, then J. D. dies in the lifetime of H. and then H. dies without issue by A. 1st question, Whether this was a good devise to J. D. 2dly, Whether he dying before the contingency happened, it was so vested in him that his executor should have it, or only intended as a personal benefit to J. D. Cowper Chancellor said, there is a difference between this devise here, which is upon a condition precedent, and where it is upon a con-

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tingency over, as to one for life, and if he die without issue, or heirs of his body, then over to another. Here the wife has nothing in this money, but this is an appointment of so much money when the contingency happened. In the former case the estate tail absorbs the whole interest. The word (remain) is observable if such an accident happened, then so much was to remain to him. If this had been a devise over, there had been no question. May not this be construed, if H. died without issue living by him? This legacy was to arise upon a condition precedent, which makes the legacy the worse; but all the cases put are of a devise over, and the fund here is devised to the wife. As to the point, if the devise be good it must go to the executor of the devisee. But he said he would consider of it. Hill. 4. Geo. Canc.

25. Joseph Aunge by will dated 28 April, 1708, gave several long annuities for 99 years in the Exchequer, amounting to 320l. per ann. to trustees for the residue of the term, *In trust for Eliz. Dod for so many years of the said term as she should live, and afterwards for the plaintiffs his god-sons for so many years of the said term as they or the survivor of them should live, and after the decease of the survivor, in trust for the heirs of their bodies lawfully to be begotten for all the residue of the said term of 99 years, and for default of such issue in trust for his nephews (the defendants) Joseph and Richard Dickenson.* These annuities were subscribed into S. S. Company in the year 1720, and the bill was to have the South-Sea stock and annuities, the produce thereof, sold, and the money raised by sale thereof to be paid to the plaintiffs, who were the god-sons and devisees for life with remainder to the heirs of their bodies, &c. Cases cited for the plaintiff. 3 Lev. 22. GIBBONS v. SOMERS. 1 Lev. 290. LOVE v. WINDHAM & al'. Cited contra PINBERY v. ELKINS, tempore Macclesfield C. PEACOCK v. SPOONER, in Dom. Proc.

King C. said, where a term is devised to a man and his heirs, or the heirs of his body, the whole term vests in the devisee, and any remainder over is void, and so it was held in the House of Lords the last sessions, in the case of Sir John RUSHOUT, the remainder in the present case is void, being after a limitation in tail.

Decreed that the stock and annuities be sold, and the money thereby raised to be paid to the plaintiffs. MS. Rep. 13 Geo. Mich. in Canc. Dod v. Dickenson.

26. Personal estate cannot be entailed. MS. Tab. Dec. 3, 1726. Stratton v. Pain.

27. A. bequeathed his personal estate to M. his wife upon condition to give his three sisters 5l. yearly for their lives, and after M's death he gave the same to D. his daughter upon the same condition, as to paying his sisters, and after D's death, to the fruit of D's body, and for want of such fruit to his brothers and sisters and their children then living. The opinion of the court was, that the limitation to the brothers and sisters was good and yet had there been any fruit of the body they must have taken an estate tail; but they never coming in esse, the second limitation was allowed to take place.

S. C. cited
Arg. by the
counsel
of the other
side, who
said, that
if this case
had depend-
ed singly
on the
words
(to her and

place. Cases in Equ. in Ld. Talbot's time 23. Arg. cites 2 Geo. after her
2. B. R. Brook v. Taylor. decease to
the fruit of

her body, it had clearly been an estate tail; but the reason was, that there were those other words (to my brothers and sisters then living) which brought † it within the compass of a life, and those words (then living) make the case to be the same as the Duke of Norfolk's case in 3 Chan. Cases. And Ld. C. Talbot said, that the case of Brooks v. Taylor (whatever reason the judges might go upon, was very different from the principal case of * Clare v. Clare by reason of the words (then living) whereas in the case of Clare and Clare there is a plain affectation of a perpetuity as strongly declared by the testator himself as can be. Cases in Equ. in Ld. Talbot's time 24, 25, 26. Pasch. 1733.

* See remainder (X.)

29. Where the use of goods is given to one for life, the cesty que use for life must *sign an inventory expressing that he is intituled to these things for life, and that afterwards they belong to the person in remainder.* 3 Wms's Rep. 336. Mich. 1734. Slanning v. Style & al'.

(G. c) Of Money with Remainder.

1. **M**ONEY cannot be entailed. So 200l. secured by an annuity by way of mortgage, mortgagee entails the annuity, remainder over by will and dies. Mortgagor pays the 200l. to the executor, *Executor shall pay the 200l. to the devisee* and not keep it and pay the interest as the annuity was limited. Chan. Rep. 129. 15 Car. 1. Wyard v. Worfe.

2. J. devised 500l. to his daughter and if she die before thirty years of age unmarried then to be divided between three; she does receive the money, and dies before that time. And resolved that the money should be divided, and her executor chargeable, as possessed in trust for the devisees in remainder, 2 Freem. Rep. 137. pl. 172. Anon.

3. Money devised to A. for life, and after to her children, and if they have no issue remainder over, the remainder tending to a perpetuity is void. 2 Ch. R. 65. 23 Car. 2. Boucher v. Antram.

4. Portion and interest devised on contingency of death or marriage, decreed to be paid into court for the benefit of the hæres factus in case of the devisee's death who was the heir at law, saving only that she was a posthumous born child. 2 Ch. Rep. 148. 30 Car. 2. Bourn v. Tynt.

5. A devise of 100 l. to J. S. at the age of twenty-one years; and if J. died under age, then J. N. and A. B. to have the 100l. or else the survivor of them. A. B. and J. N. die both in the life of J. S. and before the age of twenty-one years, and then J. S. died under the age of twenty-one years. The administrator of J. N. who survived A. B. sued, and obtained a decree for 100l. for though he died before the contingency happened, yet his administrator should have it. 2 Vent. 347. Trin. 32 Car. 2. Anon.

6. A. had issue three daughters and devised to his three daughters 540l. equally to be divided between them, that is to say, 180l. a piece; but if any of them die without a child her part to go to the survivors;

survivors; one of the daughters married B. and before the portion paid she died without issue. B. had a decree for the 1801. For a sum of money cannot be entailed. 2 Vent. 349. Pasch. 32 Car. 2. Broadhurst v. Richardson.

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7. A. by will in writing after several legacies thereby given gave all the rest and residue of her estate unbequeathed, which consisted mostly in ready money to be put forth to interest by her executors, and one half of the interest to be paid to B. her sister during her life and the other half to C. daughter of B. and C. after B's decease to have all the interest during her life, and *if B. died without issue of her body*, then the principal of the residue should be equally divided between D. and E. decreed a good will as to the limitations, and the executors to accopt accordingly. 2 Chan. Rep. 410. 3 Jac. 2. Smith v. Fisher.

8. Interest of money is devised to A. for life and *if he die without issue*, then the principal to go over to B. it is a good remainder, and decreed the money to go according to the will; but with this, that in case there should be issue of A. such issue should have the absolute and intire interest in the money. 2 Vern. 38 and 59. Hill. and Pasch. 1688. Smith v. Clever and Farmer.

2 Ch. Prec.
483. S. C.

9. A remainder or devise on contingency to happen within the compass of a life is a good devise, or *limitation over*, even of a personality or of a sum of money or chattle personal. Arg. 2 Vern. 760. Trin. 1718. in case of Pinbury v. Elkin.

to Mod.
441. S. C.
in Canc.
and decreed
accordingly
by the Mas-
ter of the
Rolls. Trin.
5 Geo.

10. A. possessed of a personal estate of the value of 333l. having a wife and a sister, but no issue, devised *that such part of his estate as his wife should leave of her subsistence should return to his sister and the heirs of her body* and made his wife executrix; the wife married and died living her husband. The Master of the Rolls said, that if the court could pick out the meaning of this will it ought to take place, and that it is now established that personal things or money may be devised for life, remainder over, and that though it be true that the wife had a power over the principal sum provided it had been necessary, yet not otherwise, so that her money was not a gift in law for this was trust money, and directed that the Master inquire how much had been applied for the wife's subsistence, and the husband to account for the residue. Wms's Rep. 651. pl. 185. Trin. 1720. Upwell v. Halfey.

A. devised
portions
to B. and
D. and E.

11. Money limited after a *dying without issue* generally is void, but if it be after a *dying without issue then living* is good. Gibb. 68. Trin. 2 & 3 Geo. 2. Green v. Rod.

payable at their respective ages of twenty-one or marriage, and *if any of them die before the time of payment or without issue*, then his or their portion to go to the survivor or survivor and his heirs. The Master of the Rolls held that this could not be intended a dying without issue generally, but so as the survivors might take, which must be during their lives and so good. Ch. Prec. 518. Pasch. 1719. Nicholls v. Skinner.

But Ibid.
249. says S.
C. that upon
15 Nov.
1736, upon
hearing
two other

12. J. S. being seised of a real estate and possessed of Bank and Orphan's stock, by will reciting that a marriage is proposed between his niece A. and his cousin B. *devises to trustees* his real estate and Bank stock, and money in Orphan's fund, and the produce of the same, *in trust to pay the rents and profits to A. during life, or to such person*

person as she by writing should appoint, with or without the consent of any husband; but if she should marry B. then, after the decease of A. in trust for B. during life, and after his decease in trust for the first and other sons successively of A. and B. and their heirs male; and for want of such issue in trust for the daughters of A. and B. equally to be divided between them, and for want of issue of that marriage, in trust for the issue of the survivor of them; and if neither of them leave issue, in trust for C. for life, with remainder for such child and children, as his brother D. should leave living at his decease, or that D's wife should be enfeint of, that should attain the age of twenty-one, and to the heirs, executors, &c. of such child or children equally to be divided between them, as they should respectively attain the age of twenty-one years; and if no such child attain that age, then to his own right heirs; but if A. should not marry B. then in * trust after her decease for C. for life, remainder to the child and children of D. ut supra, and if none attain the age of twenty-one, then to his own right heirs; and devised the residue of his ready money, plate, &c. mortgages, &c. and all other his estates, real and personal to A. and C. equally to be divided between them, their heirs, executors, &c. and made C. and A. joint-residuary-legatees, and W. N. and W. R. executors, and died. A. and B. intermarried; B. died without issue; C. married and died without issue; A. died without issue, having made her will, and appointed an executor; D. died before A. leaving issue two sons, E. and F. above twenty-one years of age; E. died before A. intestate, leaving G. a daughter an infant now living; F. is also living; the Orphan's Fund and Bank Stock were not transferred but remain as at the testator's death. Upon hearing this cause 22 Nov. 1731, Ld. C. King held the limitations after the estate tail void, and dismissed the Bill. Cases in Equ. in Ld. Talbot's time 55. *Sabbarton v. Sabbarton*.

causes upon the same will a reference was made to the judges of B. R. for their opinion, how a bequest of a term for years in lands, upon the like limitations as above to the child and children of D. would be considered. And they delivered their opinions that as this case has happened [by the others dying all of them without issue] the limitation of a term for years in the like manner would have been good.

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(H. e) Personal and Real Estate jointly with Remainder.

1. **A**N estate with the furniture of the house is limited to A. and such heirs of her body as should be living at her death, and for default of such, remainder over; per Cur'. this makes estate tail in the land, and the goods disposed in the same clause must go in the same manner, and consequently the absolute property is in the first devisee, and no remainder of goods after an estate tail is good. 2 Vern. 325. pl. 314. Mich. 1695. *Richards v. Lady Bergavenny*.

The words (heir of the body) must not as to the land be construed to be words of limitation, and make an estate tail, and as to the

goods to be only words of designation of the person intending to take the goods. 2 Vern. 325. S. C.—S. C. cited Gibb. 320. 5 Geo. 2. and says, that upon the authority of the above case it was so determined in June 1730 in the Court of Exchequer in the case of *Williams v. Tomkins*.—And. Ibid. 514. Trin. 5 Geo. 2. in Caut. in case of the Attorney General on behalf of the Goldsmith's Company of London v. Hall. S. P. decreed accordingly.

Wms's
Rep. 290.
S. C. men-
tions no
land or
real estate,
but only
govern-
ment secu-
rity directed
to be in-
vested in
lands and
settled as
there, and
bequeathed
all the rest of his personal estate to B. and the heirs male of his body, remainder over in the same manner, and that Ld. Cowper said, it was plain that the personal estate could not be intailed, but *the whole property was in B.*

2. A. having by his will given some legacies, devised *all the rest and residue of his real and personal estate to B. and the heirs male of his body*, remainder to B. and the heirs male of his body, with like remainders over, some part of the personal estate being government securities, was directed by the will to be vested in a purchase of land to be settled in the same manner, but as to the residue of the personal estate no further notice was taken of it than in the devise above mentioned of all the rest and residue of his real and personal estate, which residue amounted to 14 or 15000 l. It was agreed by the counsel of both sides, that all that residue invested in B. could not bear any further limitation. Ch. Prec. 421. Mich. 1715. Seale v. Seale.

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3. A. devises and bequeaths all his real and personal estate to *his wife*, provided if she die without issue by A. 80 l. *shall remain to B. after her decease*. B. died in the life of the wife. Adjudged a good legacy, and decreed with interest and costs. 2 Vern. 758. Trin. 1719. Pinbury v. Elkin.

S.C. Wms's
Rep. 700,
701. Trin.
1721. but
stated differ-
ently; and
in a note
there 701.
It is said, that this report in Ch. Prec. 567. is not warranted by the register-book. Bagwell v. Dry.

4. A. devised his real and personal estate to *his four daughters, and their heirs, executors, and administrators*; one of the daughters died. Decreed that her share shall go in the same manner as a real estate to the surviving daughter. Ch. Prec. 567. Trin. 1721. Per Ld. Chancellor cites it as the case of Barkwell v. Dry.

5. A. gave the interest of 400 l. to B. for life, and then to his first son, payable to him until 21, and then he to receive the principal sum. But if such eldest son die before 21, then to the 2d, &c. son in like manner; and so devised another 400 l. to C. and his first, &c. son in like manner; but if either B. or C. die without issue, his share to go to testator's right heirs; and A. made his wife executor. The Master of the Rolls decreed, that in case of B. and C's death without issue living at their death, that the share of him or them so dying should belong to A's right heirs, and not his executrix; but that if they should die leaving issue, and such issue die before 21, then those shares should sink into the residuum of testator's personal estate. Upon appeal to Ld. C. Macclesfield, he took a difference between a limitation of a trust of a term so as that all power of alienation might be restrained, and perpetuity introduced, and a limitation of a trust of money which may be subject to more remote contingencies; for he thought a bond to pay money on death of A. without issue of his body good, and the same of a trust of money so limited. However, that this case must be understood of a dying without issue then living; but whether in case of the death of B. or C. without issue then living, it should go to the present or to the then right heir of A. his lordship would not then determine. Wms's Rep. 748. Mich. 1721. Pleydell v. Pleydell.

6. A. having three sisters, B. C. and D. gave by his will one moiety of his real and personal estate to B. and the heirs of her body and for want of such heirs, then after her death to the children of C. and for the other moiety to B. for life, remainder to the heirs of her body, remainder over. The first limitation was held void, but the second was held good, though there was no other difference than that in the second the devise was to the sister expressly for life, Arg. Gibb. 321. cites it as a case heard March 10th, 1726, in Dom. Proc. between Stratton and Paine.

7. A. seised in fee, and also possessed of a lease for 21 years in the possession of B. and C. devised all his lands, &c. which he then stood seised or possessed of, or any ways interested in, and which were in the possession of B. and C. to M. his wife for life, remainder to J. N. in tail, remainder to W. R. for life, remainder to trustees to preserve contingent remainders, &c. remainder over. The freehold and leasehold lay so intermixed, and had been so long enjoyed together that it would be very difficult to distinguish them; Ld. C. King thought the words (seised, possessed, or any ways interested in) very strong and distinguished this case from that of ROSE v. BARTLET, and thought the leasehold premises ought to pass by this will. 2 Wms's Rep. 456. Pasch. 1728. Addis v. Clement.

8. Item, I give and bequeath all my real and personal estate to my son Francis Hall, and to the heirs of his body to his and their use, to be paid to him in three years after my death, and during the time I make Sir J. N. my executor of this my will, and after the said three years expired, I do appoint that my son F. shall be my executor, and if my said son F. shall die, leaving no heirs of his body living, then I give and bequeath so much of my said real and personal estate as my said son shall be possessed of at his death to the Goldsmiths Company in London in trust for several charitable uses mentioned in the will; but my will is that the company shall not give my said son any disturbance during his life. The testator dies, F. the son, after three years, takes the execution of the said will, suffers a recovery of the real estate and dies without issue, leaving his wife executrix. King Chancellor, the Master of the Rolls, and Reynolds Chief Baron were unanimous that the limitation over was void, as the absolute ownership had been given to F. the son, for it is to him and the heirs male of his body, and the company are to have no more than he shall have left unpent, and therefore he had a power to dispose of the whole, which power was not expressly given him, but it resulted from his interest. The words that give an estate tail in the land must transfer the intire property of the personal estate, and then nothing remains to be given over, and dismissed the bill. Gibb. 314 to 321. Trin. 5 Geo. 2. Attorney General and Goldsmiths Company v. Hall.

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9. Testator devised a term for years and all his personal estate to A. an infant, and if A. died during his infancy, and his mother should die without any other child, then to B. A. died during his infancy, though the wife was living and might have a child; yet the court aided B. the devisee over, by directing an account and discovery

discovery of the estate in order to secure it in case the contingency should happen. 3 Wms's Rep. 300. Trin. 1734. Studholme v. Hodgson & al'.

(I. e.) Restrictions from Alienations.

And the Effect thereof.

1. **D**EVICE to A. till B. should come to the age of 22 years, then the remainder of the part to C. and D. upon condition, *that if any of his said sons, before B. shall come to the age of 22 years, shall go about to make sale of any part, &c. he shall for ever lose the lands, and the same shall remain over, &c.* C. leased for 60 years, and so from 60 years to 60, reserving no rent, such lease is a sale within the intent of the will. 2 Le. 82. pl. 110. Mich. 29 Eliz. B. R. Large's case.

2. A. has two sons, B. and C. A. devised land to B. in tail, and other lands to C. in fee, provided if any of his sons or any of their issues do alien or demise any of the lands before any of them comes to the age of 30 years, *that then the other shall have the estate, and does not limit what estate.* One of the sons makes a lease for years before such age, the other enters, and before he comes to 30 years he *aliens that part into which he made entry*, and the other brother, being the eldest, enters; per Cur. this is a limitation, and upon such an alienation the lands is discharged of all limitations. Owen 55. Hill. 30 Eliz. Spittle v. Davis.

3. Lands were devised to B. and C. and *if either of them or their heirs do sell the same, the gift of it shall be void and it shall return to the heir.* This is a void condition, being annexed to a fee. Cro. E. 744. pl. 22. Hill. 42 Eliz. B. R. Shailard v. Baker.

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Golb. 102.
S. P.

4. Devise to A. in tail, *provide if A. shall attempt to alien*, then immediately his estate shall cease and another shall enter. A. made *feoffment*, he in remainder entered; per Cur. the condition is void, for a man cannot be restrained from an attempt to alien, for non constat what shall be judged an attempt, and how can it be tried? and when the express words are so, there shall not be made another sort of construction than the will imports; and so the judgment given in the grand sessions for the feoffee against him in remainder was affirmed. Vent. 321. Mich. 29 Car. 2. B. R. Pierce v. Winne.

Jo. 59.
S. C. of
Foy v.
Hinde, re-
ports, that
judgment
was against
D.—See
Savil 76.

5. A. devised land after his death without issue male to B. in tail male, *until he or they make any acts to alter or discontinue this estate tail*, and then to C. and the heirs male of his body, with several remainders over. Devisor dies without issue. B. enters. C. dies, leaving issue D. B. levies a fine. D. enters. Resolved the remainder to C. was not contingent but an immediate devise; because, should it be a contingent, the devisor's intent would be destroyed, which

which was, that every one successively should enjoy the land, and judgment for D. Raym. 429. Hill. 32 & 33 Car. 2. B. R. cites the case of Foy v. Hind.

Serjeant
Rudhall's
case. S. P.
—Le. 298.

Ruddal v. Millar. — Mo. 212. S. C.

6. Devise to A. for life, remainder to her first son, and the heirs of the body of such first son, &c. and for default to B. &c. Before sealing and publishing, this memorandum was made, viz. *memorandum*, my will and meaning is, that A. shall not alien the lands given to her from the heirs male of her body, &c. but to remain upon default of such issue to B. and the heirs male of his body to be begotten, according to the true intent and meaning of this my will. This memorandum is rather like a proviso than habendum in a deed, and makes no alteration in the limitation, and in that it is clear, it is a *general tail*. 3 Mod. 81. Pasch. 1 Jac. 2. B. R. *Friend v. Bouchier*.

Pollex. 657.
S. C. — S. C.
2 Show.
405. adjor-
nator. But
the court
inclined
that it was
an estate
tail, and
that testa-
tor intended
so, other-
wise he

would not have thought that he had power to alien. — The words in the memorandum are reported the same in Pollexen as here; but in Skin. 240. S. C. they are, that A. shall not alien the lands given to her, *but that they shall be to her heirs males, and for want of such issue, to B. &c.* and adjudged for a grand daughter of a son against B. the words (heirs male) in the memorandum being to be construed heirs male according to the intent and meaning of his will.

7. A. devised all the rest of his personal estate by *leases in trust*, or otherwise, to his three nephews A. B. and C. and makes them executors, and wills, that they shall give bond to each other, that in case either die without issue of his body, to leave at their death all the said chatties and personal estate to the survivors and survivor of them; and the bill was to have the said bonds given, but was dismissed, being an attempt to intail a personality. Abr. Equ. Cases 207. Trin. 1703. *Williams v. Williams*.

(K. e) Sale of Lands good, where made by Exe- [458] cutors.

1. A. devises his land to be sold by his wife, whom he makes executor. She afterwards marries, and sells it to her second husband; and adjudged a good sale. Pl. C. 414. cites 10 H. 7. 20. Br. Executors 175.

2. The authority of the executors to sell cannot be *impaired or frustrated* by any mesne act of the heir or other person, as by feoffment by the heir, or by his being disseised by a stranger. Kelw. 40. b. pl. 4. Mich. 17 H. 7. says it was adjudged by all the justices of England,

Nor by any
act of their
own; for
if they re-
lease to the
heir, yet af-
terwards

they may sell. See Co. Litt. 265. b.

3. By the statute 21 H. 8. it is provided, that where lands are willed to be sold by executors, that though part of them refused, the residue may sell.

Albeit the
letter of
the law ex-
tends only

where executors have a power to sell; yet being a beneficial law, it is by construction extended where lands are devised to executors to be sold; yet in neither of these cases albeit one refuse, can the other make sale to him that refused, because he is party and privy to the last will and remains executor still. Co. Litt. 113. a.

4. If all the *executors sell severally* the lands to several persons, such sale which is most beneficial to the testator shall stand and take effect. Per Counsel. Le. 60. pl. 78. Pasch. 29 Eliz. B. R. Bonefant v. Greenvil.

5. Devise of land to his four executors; and further willed, *that his executors should sell the same to A. for the payment of his debts, if the said A. would pay for it 1300 l. at such a day.* A. did not pay the money at the day; one of the executors refused administration; the other three entered and *sold to B.* Adjudged that the condition for the manner of it was good. Le. 60. Bonefant v. Greenvil.

3 Le. 119.
pl. 171. S.C.
in totidem
verbis.

6. A. seised of lands by his will devised, that his executors should sell his lands, and died; the *executors levy a fine thereof to one F. taking money for the same of F.* If in title made by the conusee to the land by the fine, it be a good plea against the fine to say, *quod partes ad finem nihil habuerunt*, was the question. Anderson conceived that it was; but by Windham and Periam, upon not guilty, the conusee might help himself by giving the special matter in evidence, in which case *the conusee shall be adjudged in, not by the fine, but by the devise.* Le. 31. pl. 38. Trin. 33 Eliz. C. B. Anon.

7. A. devised that his executors shall sell his land; they may sell *part at one time, and part at another.* 1 Rep. 173. b. (c.) in Digges's case.

Le. 31. pl.
38. Trin. 13
Eliz. C. B.
by Wind-
ham, and
cited 19 H.

8. If by the custom a man devises that a reversion, or any other *thing, that lies in grant*, shall be sold by the executors, they may sell the same *without deed*; for the vendee shall be in by the deviser, and not by his executors. Co. Litt. 113. a.

6. 23. — 3 Le. 119. pl. 171. Mich. 27 Eliz. C. B. in totidem verbis; [but instead of 19 H. 6. 23. cites 17 H. 6. 23. which seems to be a mistake, and that it should be 19 H. 6. 23. b. 24. a. pl. 67. The Lord Salisbury's case.]

9. On a bill of review an error assigned was, that lands were decreed to be sold pursuant to the will for payment of debts, *without giving the heir a day to shew cause after he came of age.* Lord Keeper confirmed the decree; for the lands being devised to be sold for payment of debts, there is nothing descends to the heir, and an immediate sale may be decreed without giving a day to shew cause, though an infant; but *if he had been decreed to have joined in the conveyance, there he must have had a day after he came of age.* 2 Vern. 429. pl. 391. Hill. 1701. Cooke v. Parsons.

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(L. e) Sale.

By what Executors, Feoffees, Trustees, &c. now,
or at Common Law.

1. **I** F a man makes a *feme covert*, or a *monk professed*, his executor, and devises the remainder to be sold by them, they cannot make a deed, and yet their sale is good without deed, without any attornment; nor can they levy a fine; the reason seems to be inasmuch as when the sale is made, it passes by the testament, and not by the sale; but he in whom it is vested by the sale cannot grant it over without deed and attornment; so note a diversity. Br. Devise, pl. 12. cites 19 H. 6. 23.

2. And Brook says the same law seems to be of an *infant executor* as of a *feme covert*; and it seems that Newton delivered the resolution of the court; for this matter was alleged in arrest of judgment, and yet the plaintiff recovered. Ibid.

3. If a man has feoffees seised to his use, and wills by his last will, that they shall sell his land, and dies, the feoffees enfeoff others to the first use; and per Kingmill the *second feoffees* may sell his land; quære; for 15 H. 7. 11. is contrary. Br. Feoffments al. Uses, pl. 12. cites 14 H. 7. 33.

4. And per Tremaille Justice, and Reede and Fineux Ch. Justices, if a man declares by his will, that his feoffees shall alien to J. S. and he dies, and they make a feoffment over, the *second feoffees* may alien to J. S. for there is in manner a use in J. S. Br. Feoffments al. Uses, pl. 12. cites 14 H. 7. 33. and 15 H. 7. 11.

5. If a will be that his land in feoffment shall be sold, and does not say by whom, now the executor shall sell it, and not the feoffees; per Reede, Tremaille and Frowick, which Fineux in manner affirmed. Br. Feoffments al. Uses, pl. 12. cites 14 H. 7. 33. and 15 H. 7. 11.

6. If a man wills that his executors shall sell his lands, and distribute the profits coming thereof for his soul, and they prove the will, and make their executors, and die before they sell; the executors shall sell the same; but if they make no executors, their administrators shall not sell, for want of privity, for the sale is a thing of trust, &c. Perk. S. 549.

7. If a man wills that J. S. his now executor shall sell his land, the executors of J. S. shall not sell the same, because it appears by the words of the will, that no other shall sell; and always he shall sell, in whom confidence and trust is reposed. And therefore if a man wills that J. S. Mayor of London shall sell, &c. And J. S. is Mayor of London at the time, and before the sale another man is chosen Mayor, in this case J. S. shall sell and not the new Mayor, and so it is in the like cases, &c. Perk. S. 552.

(M. e) What

(M. e) What Words give a Power to sell Lands.

* This word which completes the sense is left out in all the editions of Br. but it is in the year-book; and it was Isabel Goodcheap's case.

1. **A.** Devised land to be sold by her executors, and in their default by the executors of her executors, [* and] by four parishioners of the parish of S. It seems that those words (by four parishioners) are void for the uncertainty. Br. Devise, pl. 10. cites 49 E. 3. 16.

2. A man may declare his will that J. S. who is not feoffee nor executor to him shall alien his land. Br. Testament, pl. 22. cites 15 H. 7. 11.

3. If a man makes J. S. his executor, and wills that a monk shall sell his land, and shall distribute the profit thereof for his soul, the monk is executor to this purpose. Perk. S. 549.

4. When a man devises his lands to be sold by his executors, it is all one as if he had devised his lands to his executors to be sold; because by devising the lands he breaks the descent. Co. Litt. 236. a.

5. A. has two sons, and devises one part of his lands to the eldest and his heirs, and the other part to the youngest and his heirs, and if both die without issue, that then it shall be sold by his executors, and dies, the eldest dies without issue. Per Hutton executors cannot sell any part before both are dead, for the youngest hath estate tail in remainder in the part of his eldest brother. Het. 90. Pasch. 4 Car. C. B. Fortescue v. Jobson.

6. A. devised lands to M. his wife for life, and willed that if it should fully and sufficiently appear that M. should not find sufficient to pay his debts, and to maintain the said M. and her children, then she should sell the land, or so much as with the personal assets would satisfy his debts and maintain her and her children. M. afterwards sold the land to J. S. who being sued for the land, pleaded that at such a time it sufficiently appeared to M. that the personal assets were not sufficient, and therefore she by indenture inrolled, bargained and sold the land to him and his heirs, and so was seised in fee by the statute of uses, and that the heir at law of A. released to J. S. and his heirs. Adjudged that the value of the personal estate should have been shewn, and what was the amount of the debts, and the value of land sold, so as it might appear to the court that she had cause to sell the whole land, her authority being only to sell so much as should be sufficient, and the authority being by the will, and he pleading a sale by indenture of bargain and sale inrolled, and that by virtue thereof, and of the 27 H. 8. of uses, he was seised of the reversion, is not good. For if the sale is good by the will, he is not in by the statute but by the devise. Cro. C. 335. pl. 21. Mich. 9 Car. B. R. Dike v. Ricks.

Jo. 327. reports that this power to sell was a condition precedent, and therefore the performance should have been sufficiently averred, and to set forth the whole. That for want thereof the sale was not authorized, and so only her estate for life passed, and that the release was only to J. S. barely, and not saying to his heirs, so that J. S. by levying a fine afterwards committed a forfeiture, and the heir at law of A. being dead, the entry of his heir was lawful. That if the sale had been good

good by the performing the condition precedent, the estate of M. for life had passed by way of bargain and sale, and the reversion in fee by the power in the will; and so though two justices thought the pleading not good, yet Jones J. thought it was good enough reddendo singula singulis; but that it made nothing one way or other.

* 7. Portions devised out of lands payable at prefixed days, which the profits or rents of the premises will not do, amounts to a devise to sell. Chan. Cases 179. cites Hill. 16 Car. 1. Hughes v. Collis.

2 Vent. 357.
S. P.—S. P.
per Cur.
Chan. Cases
176. Trin.
22 Car. 2.

in case of Backhouse v. Wells.

8. If lands be devised for payment of debts, the executor may sell though authority be not specially given them, but otherwise if such devise had been for *legacies only*, or for raising portions, &c. in such case there had been no remedy but in Chancery against the heir. Keb. 14. pl. 37. Pasch. 13 Car. 2. B. R. Anon.

S. P. and if
one dies, the
other may
sell. Sav. 72.
pl. 150.
Pasch. 22
Eliz. Miller
v. Moor.—

—Relief in case of legacies denied in Canc. but the purchaser relieved in parliament, and the heir to convey Ch. Rep. 283. 19 Car. 2. Pit v. Pelham.

* Decreed to be sold where it was devised to be sold for payment of legacies only. 2 Ch. Rep. 301. 36 Car. 2. Carvil v. Carvil.

9. Devise to raise portions out of the profits of his lease-lands implies a sale. 1 Chan. Cases 240. Mich. 26 Car. 2. Cary v. Appleton.

Vern. 104.
Anon. S. P.
—Secus
if the words

are out of the annual profits. Per counsel. Ch. Cases 240.—And in this case Finch K. took a difference between a devise of the profits of a *chattel lease* and of *freehold lands*. And cited it as decreed in Ld. Corbary's case. Ibid.—3 Salk. 127. pl. 7. cites S. C.—And in case of a trust where the trustee is to pay debts, legacies, or portions out of the annual rents, issues, and profits of the estate, he cannot alien or sell to raise the money, unless it is to be paid at a certain prefixed time; and if the annual profits will not do it within that time, then trustee may sell; for it is within the intention of the trust. 3 Salk. 367. pl. 2. Anon.—Vern. 104. pl. 90. Mich. 1682. S. P. as to devises, but says such words in a deed executed in life time, will in neither case empower trustees to sell.

10. Devise of lands to trustees on trust out of the rents and profits to pay debts and legacies, the trustees may sell the land itself. 2 Chan. Cases 205. Mich. 26 Car. 2. Lingon v. Foley.

11. Devise of legacies to be paid out of the personal estate, and if that fall short, then out of the rents and profits of the real estate, the trustees were decreed to sell, &c. and to pay interest from the time the legacies became due and payable. Fin. Rep. 165. Mich. 26 Car. 2. in case of Carew v. Carew.

12. My debts and legacies being first deducted, I devise all my estate both real and personal to J. S. This amounts to a devise to sell for the payment of debts. Per Ld. Chanc. And it was said in this case by Mr. Solicitor General, that a *parol declaration* is sufficient to subject lands to the payment of debts, where a man has but an equity only. Vern. 45. pl. 45. Pasch. 1682. Newman v. Johnson.

13. Devise of a sum certain to be raised out of the profits of lands; if the profits will not raise it in a convenient time the court will decree a sale. Vern. 256. Mich. 1684. Heycock v. Heycock.

14. A. devises lands to B. in tail, remainder to C. and gives his executor power to raise out of his estate 500 l. for his next heir, and desires him to see his debts paid. This gives the executor a power to sell the lands to pay the debts. 2 Vern. 154. Trin. 1890. in case of Wareham v. Brown.

1 Vern. 429.
pl. 391.
S. C. but
S. P. does
not appear

15. Lands were devised to trustees to let and set, and out of the rents to pay; per Lord Wright these words are not sufficient to ground a decree for sale upon; but there being subsequent words, that after his debts and legacies paid, it should be to the trustees, he held that they were sufficient. Ch. Prec. 184. pl. 152. Hill. 1701. Cook v. Parsons.

* Fin. R.
415. Stubb's
case. —
Ch. Cases
262. Fowles
v. Green.
S. P.

16. Devise that his executors should receive the rents issues and profits until 500 l. should be raised; and after payment devised the land to his son. Decreed the portion to be raised with interest and costs, and that by a sale, and the * heir forthwith to join, though the estate would little more than answer debts and the 500 l. 2 Vern. 424. Pasch. 1701 Jackson v. Farrand.

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17. A. having term for 21 years in the printing-office, by will directs that 2000 l. be raised out of the profits for his daughter and her children, and made B. executor. B. mortgaged the term. Decreed that the daughter and her children should redeem, or be foreclosed; for per Cur. the executor of a testamentary estate has power over it so as to alien or sell as he shall judge necessary; and if executor sells in prejudice of a residuary or specific legatee, they may have their remedy against the executor, but not follow the estate into the hands of a purchaser. Note, this decree was afterwards reversed on appeal to the House of Lords. 2 Vern. 444. Mich. 1703. Humble v. Bill.

(N. e) Sale.

Good in Respect of the Manner.

Suppl. to
Co. Com.
Copyh. 81.
s. 15. cites
S. C.

1. A Copyholder in fee devised to his wife for life, and that she should sell the reversion for payment of his debts, and afterwards he surrendered to the use of his wife for life according to the will and deed. Adjudged that she might sell his lands, because in his surrender he referred to his will, and afterwards she surrendered upon condition to pay 12 l. This was held to be a good sale according to the will. Cro. E. 68. pl. 18. Mich. 29 and 30 Eliz. B. R. Bright v. Hubbard.

2. If a man wills that his executors and feoffees shall sell his land; and the executors sell without the feoffees unto one man, and the feoffees without the executors sell unto another man, and afterwards the executors and feoffees sell unto a third man; in this case the last sale is good, and the other two sales are not good, &c. Perk. S. 553.

(O. e) Sale

(O. 6) Sale of Lands good, where made by surviving Executor, Trustee, &c.

1. **I**T is admitted that where a man wills that his executors shall sell his land, and the one dies, that the other may sell alone. Br. Devise, pl. 50. cites 39 Aff. 17.

2. Note per Kingmill where a man has feoffees seised to his use, and declares his will that they shall sell the land, and dies, and the feoffees infeoff others to the first use, the second feoffees may sell the land. Br. Testament, pl. 6. cites 14 H. 7. 33. but cites 15 H. 7.

It is contra.

the land, for it is contrary to the law; but where the first feoffees make a feoffment ut supra, yet the first feoffees may sell the land; quod fuit concessum per Fineux and Tremaille justices; but the second feoffees may alien by command of the first feoffees; for this is their own act, viz. of the first feoffees. Br. Testament, pl. 7. cites 15 H. 7. 11. — But per Tremaille, Rede and Fineux, where the will is that his feoffees shall alien to J. N. and they make a feoffment over, there the second feoffees may alien to J. N. because he is named in the will, which makes a use in him in a manner, and not where he wills that his feoffees shall alien, and does not say to whom. Ibid.

Note, per Reale J. in the same case that the second feoffees cannot sell

3. Note, per Cur. that if a man declares his will that B. and C. his executors shall sell his land, and dies, and B. dies, and C. makes M. his executor, and dies, and M. sells, this is void; for the trust is strict; for executors of executors by the common law cannot have action as the first testator. Br. Testament, pl. 1. cites 19 H. 8. 9.

[463] S. P. Br. Executor, pl. 3. cites 19 H. 8. 4.

4. But per Brudnell, if a man wills that J. and N. his executors shall sell his land, and they refuse to be executors, yet they may sell, because they are named by proper names. Ibid.

S. P. Br. Executor, pl. 3. cites 19 H. 8. 4.

5. Contra if he wills that his executors shall sell without other name, and makes no executors, or they refuse; note a diversity; for land is not testamentary. Ibid.

6. A man willed that his land devisable should be sold by his executors, and made four executors, and died; all the executors ought to sell, for the trust is jointly put in them. But quære if one or two dies, if the three or two who survive cannot sell, for there is the most number of executors; it seems that they may; for there death is the act of God; and see the statute of 21 H. 8. cap. 4. that where such will is made, and some of the executors refuse, and the other prove the testament, those or he who proves the testament may sell; quod nota; and see the statute. Br. Devise, pl. 31. cites 30 H. 8.

7. And by some where a man wills that the land shall be sold after the death of J. S. by his executors, and makes four executors, and dies, and after two of the executors die, and after J. S. dies, there the two executors who survive may sell; for the time was not come till now. Ibid.

8. A man devised his land to his wife for life, the remainder to another for his life, and after their deaths he devised that the same lands should be sold by his executors, or the executors of his executors,

and the money thence arising to be employed for the use of his soul. He died. Afterwards *one of the executors died*; and then *the other made his executors, and died also*; and then the feme died, and he *in remainder died also*. It was the opinion of the justices, that the executors of one executor should not make the sale, for they had authority jointly, and if one of them fail, the other cannot execute the testament. Mo. 61. pl. 172. Trin. 6 Eliz. Anon.

9. And so it was said it was adjudged in FRANKLYN'S CASE, where a man devised that *J. S. and J. D. by advice of the parson of D. should make sale of his lands* after his death, and before the sale the parson died, the other two could not sell the lands. Mo. 62. pl. 172. Trin. 6. Eliz. Anon.

10. A man being seised, &c. devises *all his lands to his sister and her heirs (except out of this general grant, my manor of R. which I do appoint to pay my debts)* and makes two executors by name, and dies; and *one of the executors dies and the other executor takes upon him the charge of the executorship, and sells the manor to R.* for 300l. And it was held that he might lawfully do this and so was the intent of the testator and not to leave this reversion to his heir, but to trust the executors with the sale thereof for the speedy payment of his debts. Dyer. 371. b. pl. 3. Mich. 22 & 23 Eliz. Anon.

Mo. 341.
pl. 463.
Townsend
v. Walley.
S. C. and
the justices
that the
sale was
good.

11. A. devised that his executors should have his land for ten years for payment of his debts, and that afterwards *his executors or any of them* should sell the land for payment; he made *three executors* and died. One of the executors died, yet a sale by the other two was held good. Cro. E. 524. pl. 54. Mich. 38 & 39 Eliz. B. R. Townsend v. Wale.

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Dal. 4c. pl.
36. S. P.
held ac-
cordingly
and seems
to be S. C.

12. A man devised that *after the death of his wife his land should be sold by his executor una cum assensu A. and made his wife and a stranger executors* and died; the wife died. A. died. A sale by the stranger executor is not good; for the authority is determined. Dy. 119. a. pl. 8. Mich. 4 & 5 Eliz. Dean v. Johnson.

13. If a man wills that *his executors shall sell* his land, if they *all die but one*, before any sale made by them, *he who survives may sell*. Perk. f. 550.

14. If a man wills that *J. his heir shall sell*, &c. and J. dies before the sale; *his heir shall not sell* the land. Perk. f. 550.

15. If *cestuy que use wills that his feoffees shall sell* his land, they ought to sell jointly by reason of their joint possession, &c. But if *all the feoffees but one die before sale made* by them, then he who survives may sell, because the possession of the whole is in him, &c. Perk. f. 551.

Authority by
will was
given to A.
and B. to
convey for
children's
portions;

A. died. B. conveyed. On a bill against the heir, he demurred, because the conveyance was by B. only, but it was over-ruled. Fin. R. 260. Trin. 28 Car. 2. Bushel v. Newby and Wakefield.

16. The executors *having but a power to sell*, they must all join in the sale, if one executor dies, it is regularly true that being but a bare authority the survivors cannot sell. Co. Litt. 112. b.

17. A man devises his land to A. for a term of life, and that after his decease his land shall be *sold by his executors* generally and makes three or four executors, and during the life of A. one of the executors dies, and then A. dies; the other two or three executors may sell because the land could not be sold before and the plural number of his executors remain. But if the executors had been *named by their names* as by J. S. J. N. J. D. and J. G. his executors, then in that case the survivors could not sell the same, because the words of the testator could not be satisfied. Co. Litt. 112. b. 113. a.

Jenk 44. pl. 83. S. P. but one may sell all the *good*. Savil. 72. S. P. Perk. f. 548. S. P. cites 19 H. 8, 9. as to the last point and 19 H.

8, 9. as to the first point. — D. 177. a. pl. 32. ruled accordingly as to the last point but left a quere as to the first point.

18. A. was seised of certain lands in fee, and devised the same in tail, and if the donee should die without issue, that his said land should be *sold by his sons in law*, he in truth having five sons in law; one of his sons in law died in the life of the donee; after the donee died without issue, and then the four sons in law sold the land, and it was adjudged that the sale was good, because they were *named generally* by his sons in law, and the lands could not be sold by them all, and the words of the will in a benign interpretation are satisfied in the plural number; albeit they had but a bare authority, but if they had been *particularly named* it had been otherwise. Co. Litt. 113. a.

Le. 106. pl. 156. Pasch. 26 Eliz. B. R. Lee's case S. P. and seems to be S. C. and resolved clearly by the whole court that the sale by the said manner

was good and judgment accordingly. — Le. 285. pl. 387. S. C. in totidem verbis. — Mo. 147. pl. 291. Vincent v. Lee. S. C. — S. P. cited Goldsb. 2. pl. 4. — Cro. E. 261. Lee v. Vincent adjudged. — Cited And. 145. in the case of Lock v. Loggin, by name of Rowland v. Lee. — D. 219. Marg. pl. 8. cites Vincent v. Lee, put by Coke Attorney General and adjudged that the sons in law might sell, because the words are satisfied, and it cannot be intended that all should survive the estate tail. — But where the persons impowered to sell were named by their proper names the survivors cannot sell. D. 177. a. pl. 32. Hill. 2 Eliz. Anon. — Ibid. Marg. S. C. cited as held accordingly. Mich. 26 Eliz. C. B. — S. C. cited D. 219. a. Marg. pl. 8.

19. If a man devises lands to *his executors* to be sold and makes two executors, and one dies, yet the survivor may sell the land because as the estate, so the trust shall survive, so note the diversity between a bare trust and a trust coupled with an interest. Co. Litt. 113. a.

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20. In both the above cases the executors may sell *part* of the land *at one time*, and *part at another*, as they may find purchasers. Co. Litt. 113. a.

21. If devise be that *his executors shall sell, and after names A. and B. to be executors in the end of the will*; if one dies the other may sell at the common law for their naming them by their proper names in the first part of the will annexes to the sale a trust to A. and B. and appropriates the trust to them as private persons. Jenk. 44. pl. 83.

22. It seems that if devise be, that *A. and B. his executors shall sell certain land, and in the end of the will also names them executors*, if the one had refused at common law or died, the other might sell; for the interest is annexed to the executorship by this repetition. Jenk. 44. pl. 83.

23. A man deviseth lands to his wife for life, and afterwards orders the same to be sold by his executors and the monies thereof coming to be divided amongst his nephews, and makes A. and B. his executors and died. It was referred to three justices, who certified, that the executors had not a good interest by the devise, but an authority only, that the surviving executor notwithstanding the death of his companion might sell. But if they might sell the reversion immediately, was not resolved. Cro. C. 382. pl. 10. Mich. 10 Car. in B. R. Howel v. Barnes.

24. It has been held, that if a man devise that his lands shall be sold by his executors for payment of his debts, that that will give the executors an interest; as well as if he had devised his land to his executors to be sold. Otherwise where he devises in general, that his lands shall be sold without saying by whom, though in that case the executors must sell, per Hale Ch. B. Hardr. 419. in pl. 5. Trin. 17 Car. 2. in case of Barrington v. Attorney General & al' cites 15 H. 7.

(P. c) Sale of Lands by whom good on Refusal, &c. of Executors, or some of them.

1. A Feme devised in tail land in London, and for default of issue to be sold by his executors, and in their default by the executors of his executors by four parishioners of the parish of S. and made three executors, and died; the one executor died, the other refused, and the third sold after the tail determined. Quære; for it seems that the sale of the one executor is not good; and it seems that these words by four parishioners, are void for the uncertainty. Br. Devise, pl. 10. cites 49 E. 3. 16.

2. And it is held there, that if all the executors refuse, there the administrator admitted by the ordinary cannot sell. Br. Devise, pl. 10. cites 49 E. 3. 16.

3. A man devises that his land shall be sold by his executors; this shall extend to executors of executors. Arg. 2 Bullst. 291. cites 19 H. 6. fo. 9. in case of Fox v. Whitecock.

Kelw. 107.
b. pl. 25.
contra.

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4. If a man has feoffees, &c. and makes his will that his executors shall sell his land, and dies, and they refuse the administration, yet they may sell because it is named in every testament who shall be executor, and land is not testamentary; therefore when they are named, they are the same persons who were trustees, but by this name executor the ordinary nor no administrator can sell. Br. Testament. pl. 7. cites 15 H. 7. 11. per Fineux Ch. J.

5. But where a feoffment is made to the intent that his executors shall sell, and after he does not make executors, there the land cannot be sold. Ibid.

6. Contra if he makes executors, notwithstanding the general term of executors before without naming their names; for it suffices if they are named in the end of the testament of the goods, though they are

are not named *in the will of the land by proper names*; and so note a diversity between a will and a testament. Ibid.

7. Devise that his executors shall sell his land, and afterwards his executors *refuse to meddle with the will*, yet they may sell the land, for it is a thing limited for them to do over and besides the testament. Per Frowick Serjeant. Kelw. 44. b. 45. a. 17 H. 7.

(Note if this land was in fee. What difference?)

15 H. 7. 12. a. S. P. — Le. 60. S. C. cited in case of Bonefant v. Greenville.

8. If a man has feoffees in his land and wills that *his executors shall sell* his land, and he *makes no executors*, the ordinary shall not meddle with the land nor administrator, for the ordinary can only meddle with things testamentary, as goods, and the administrator, who is his deputy only, can do no more; and it was lately adjudged in Cam. Scacc. per omnes J. Angl. that if a man makes a will of his land, that his *executors shall sell* the land and alien, &c. if the executors *refuse the administration* and to be executors, now the *administrator* or ordinary cannot sell nor alien it. Quod fuit concessum. Per Rede and Tremail for good law. 15 H. 7. 12. a. b.

But the executors may sell though they refuse to prove the will; for it is not given to them as executors. 2 Jo. 26. Trin. 22 Car. 2. in case of Pitt v. Pelham. Arg.

9. If a man wills that *his executors shall alien* his lands, *without naming their proper names*, if they *refuse the administration* and to be executors, yet they may alien the land. Per Fineux and Tremaille, and not denied by Rede. 15 H. 7. 12. b.

10. If a person be *named* by the will to sell, and he *refuses*, he that shall have advantage by the sale shall compel him by *subpœna*, quod fuit concessum per Cur. And if the person named enfeoff others, a sale by those *second feoffees* is merely void. Kelw. 45. T. 17 H. 7.

11. Note, that if a man wills by his will, that *his executors shall sell his land*, and *makes two executors*, and dies, and the *one proves the testament*, and the *other refuses*, and he who proves sells the land, this is good by the statute 21 H. 8. 4. where it was expressed, that it was doubted at the common law whether the sale by the common law was good or not; quod nota bene. Br. Devise, pl. 26. cites 21 H. 8. 4.

12. Devise of lands to his wife for life, and that *after her decease his wife or his executors should sell* the land; sale by the wife seems to be good. Per Shute J. Godb. 46. Mich. 28 and 29 Eliz. B. R.

He made his wife and another executor; the other executor died;

the wife sold, and the sale held good. Le. 220. Anon.

13. A. seised of the manor of D. *devised it to three and their heirs* to sell it at the best profit, and to convert the money thereof coming to the performance of his will; and in the conclusion of the will he *makes them his three executors*, and dies; one of the three *refused to meddle* with the will or sale, and the other two sell the land in the life of the third. Adjudged the sale good by the two, either by the common law, or by the statute of 21 H. 8. 4. For when he devised the land to three to sell, this doth *tantamount* as if at the first he had devised that such his executors should sell; and in such a

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case the sale by two, the third refusing, was good; for they two may perform the will without the third; but the statute makes it clear. Cro. E. 80. pl. 43. Mich. 29 and 30 Eliz. in Scacc. Bonifant v. Greenfield.

14. To be sold by his executors, or one of them, and makes several executors; sale by two of them is good. Mo. 341. pl. 463. Hill. 35 Eliz. C. B. Townsend v. Walley.

D. 219. pl. 15. Devise that his executors shall sell lands with the assent of J. S. if J. S. dies before the assent, the executor shall not sell. 2 Brownl. 100. Trin. 9 Jac. C. B. S. P. — Dal. 45. pl. 36. S. C. and S. P.

So where the devise was that his heir might sell; the heir of his heir may sell. Arg. Bulst. 219. cites 19 H. 8. 10.

16. Devise that executor shall sell, executor of executor may sell notwithstanding he is not in esse at the time of the devise. Per Winch J. 2 Brownl. 194. Trin. 10 Jac. C. B. in case of Rolls v. Macon.

17. A. devised lands to be sold by the heir of B. B. is at- taint for felony in life of A. A. dies; the eldest son of B. cannot sell the land, for he is not heir; the blood is corrupt. He is issue of B. Jenk. 203. pl. 27.

18. A sale was directed to be made upon the happening of a contingent estate, which did not happen in the executor's time, who was decreed to make the sale, but happening after his death, the executor's executor, and those who claimed the land after his death, was decreed to sell. Chan. Cases 180. cites 18 Jan. 1659, the case of Tenant v. Brown.

19. Lands were devised to be sold by executor who dies. The youngest children for whose benefit the sale was ordered, prefer their bills against the heir; heir demurrs because but an authority in the executor which is dead with him, but the demurrer was over ruled. Ch. Cases 35. Mich. 15 Car. 2. Garfoot v. Garfoot.

20. If a devise be to an heir on condition to sell, it is a void condition, but yet it is good by way of trust in equity, and the heir must sell. Arg. Chan. Cases 177. Trin. 22 Car. 2. in case of Pitt v. Pelham.

Decreed in Dom. Proc. that the vendees of executor should have the land. 2 Jo. 26. S. C.—And decreed the heir to sell, and so reversed the dismissal upon advice of the judges. For when no person is appointed to sell, it ought to be intended that he shall sell who has the estate, which is the heir. Lev. 304. S. C.

21. Lands were appointed to be sold, (but no devise was made of them) and the money to be distributed between the wife and heir at law, and three other relations. Whether the heir shall be forced to sell the land after the death of the executor, there being no party named to sell. Ld. K. took a difference between a devise of money out of the profits raised by sale of lands, that the first favours of a trust, the last amounts to a disherison, and is more than a charge upon the land in the heir's hands, and so dismissed the bill in favour of the heir; but with directions that this should be no precedent. Chan. Cases 176. 180. Trin. 22 Car. 2. Pitt v. Pelham.

22. Lands were devised to be sold for payment of legacies, and none expressed to sell, the same decreed to be sold by the executors, and the said* legacies to be paid thereout according to the will. 2 Ch. Rep. 301. 36 Car. 2. Carvill v. Carvill.

Kelw. 44. b 45. S. P. per Cur. So if it be land in the hands of

feoffees, and so expressed in the will. 15 H. 7. 12. b. —Where the devise is for payment of debts, or for charitable uses. Arg. Agreed 2 Jo. 25, 26. and cites 15 H. 7. 12. D. 171. —2 Le. 220. Anon. Sale by surviving executor held good.

23. Executors were directed to sell land, and with the money arising out of the sale and surplus of testator's personal estate to purchase annuity of 100l. a year for J. S. for her life; &c. The executors renounced. Administration with the will annexed was granted to J. S. and a bill was brought to compel a sale, and the heir to join. But the executors not being made parties, the same was objected; because notwithstanding they had renounced yet the power of sale was said to continue in them, and that it was collateral to their executorship. But there being a power only, and no estate devised to the executors, the objection was over-ruled. 2 Wms's Rep. 308. Mich. 1725. Yates v. Compton.

(Q. e). Sale. By whom. No Person being appointed to sell.

1. DEVISE of lands to be sold for payment of his debts. It shall be sold by his * executors, and the naming them executors is sufficient. Per Gawdy J. 2 Le. 145. in Inchly and Robinson's case.

S. P. Arg. 4 Le. 75. in pl. 172. — Kelw. 45. a. Trin. 17 H. 7. S. P.

per Reade J. Quod fuit concessum per Cur.

* S. P. and not his feoffees. Per Rede Tremaile Frowike and Fineux in a manner affirmed in Br. Testament pl. 7. cited 15 H. 7. 11. — So in case of legacies. See Carvill v. Carvill. 2 Ch. Rep. 301. — They shall be* intended trustees though not named as such. Fin Rep. 432. Dormer v. Dormer. — Because testator gives authority, but appoints no persons expressly to sell, so the law intends it to be by such as are to pay his debts, and that is his executor or one executor. Arg. agreed, And. 146. in case of Lock v. Loggin. — And if one of them dies, the other may sell. D. 371. b. pl. 3. Mich. 22 & 23. Eliz. Anon. — S. C. cited And. 145. pl. 193. — S. C. cited Arg. Bridgm. 106. and cites also 15 H. 7. 126. S. P. accordingly. — Dal. 106. pl. 56. Trin. 15 Eliz. S. P.

2. Where lands were devised to be sold, and the monies to be distributed to several persons, and no person was named to sell, there by consent of counsel it was decreed that the executors should sell. Chan. Cases 179. cites 13 Nov. 13 Car. 1. Lockton v. Lockton.

3. As for my lands, tenements, goods and chattles, I give and bequeath as follows; after my debts paid, to my five daughters 100l. a piece, and to be paid at their ages of 20 years; also I give to my wife, whom I make my executrix, all the rest of my lands and tenements, goods and chattles. The personal estate was not sufficient to pay the debts, nor could the executrix out of the profits of the premises, being but 63l. per annum, raise money to pay the debts and the daughters portions, being 500l. Therefore the court conceived it was intended by the will, that the executrix should raise money to pay the debts

and legacies, and decreed the executrix to sell accordingly, and by sale to satisfy the plaintiffs. Chan. Cases 179. cites 1 Feb. 16 Car. 1. Hughs & al' v. Collis.

[469] (R. e) At what Time the Sale may be made.
And in what Cases, if not sold, the Heir may enter.

1. IF a man devises his land to be sold by his executors, and dies, and his heir enters and dies seised, and his heirs enter by descent, yet the executors may sell the land according to the will of the devisor; per Newton J. Br. Devise, pl. 32. cites 11 H. 6. 12.

2. If a man devises his land to be sold by his executor, and dies, and the heir enters and charges the land, and after the executor sells, the vendee shall hold discharged. Per Brudnell Ch. J. Br. Charge, pl. 15. cites 14 H. 8. 10.

3. So if the heir suffers a recovery or levies a fine. Ibid.

4. So where a man disseises the heir and dies seised and his heir enters and the executors sell, the vendee may enter; for he has no right, nor is any action given to him; for he has only a title to enter by the sale, and therefore he may enter; for otherwise he has not any remedy; per Huls. J. Ibid.

5. When it so happens that the land cannot be sold, the heir shall have the same. As if a man seised of land deviseable, devises by his will, that his land shall be sold by his executors, and dies, and all the executors die intestate before any sale made by them or any of them; in such case the heir shall keep the land, and if cesty que use of land in fee wills that J. S. now his executor shall sell, &c. and J. S. dies before any sale made by him, then the use is in the heir to keep to him and his heirs for ever, &c. Perk. f. 554.

6. A man devised his land to be sold by his executor after the death of the testator. One tenders to him a certain sum of money for the lands, but not to the value, and the executor afterwards held the land in his own hands two years, to the intent to sell the same dearer to some other and took the profits all this while to his own use. Here the executor is to make the sale as soon as he can, and if he do not the heir of the devisor may enter, for he took the profits here to his own use not as assets. But if a man devise that his executor shall sell his land, there he may sell it at any time, for that he hath but a bare power and no profit. Litt. 383. and Co. Litt. 236. a.

7. Devise to J. S. for life, and after that his executor shall sell the land; they may in the life-time of J. S. The word after is as much as to say, after the determination of the estate; per Haughton J. 2 Bullst. 125. Mich. 11 Jac.

It means the estate which is to come after the death of

J. S. as where the devise was to J. S. for life, and that after his death J. S. or his executors should sell, J. S. may sell the land; per Clench J. Godb. 46. pl. 57. Mich. 28 & 29 Eliz. B. R. Anon.

8. The

8. The case was; *Zachary Thomas*, seized in fee of the manors of *D. S. and V.* and having three daughters, *Jane, Mary, and Sarah*, by his will devises *D.* to *Jane* and her heirs for ever, *provided that she marry my nephew Theophilus Thomas at or before she attain the age of 21 years*, and this estate was of the value of 200*l.* per annum or more; and if she refuse to marry my said nephew *Theophilus*, or be married to any other before she attain the age of 21, then he devises *D.* to his second daughter *Mary*, and to her heirs, and he devises *S.* to *Mary* and her heirs with the like limitations, and *V.* to *Sarah* and her heirs; and then he said, *provided, and my will is, that if neither of my said daughters shall be married to my said nephew before their respective ages of 21, then I devise my said estates of D. and S. to my wife and five other trustees, and they to sell and dispose of the same, and the monies raised by such sale to distribute among his said daughters as they shall think them deserving*; and it is further found by the jury, that *Theophilus* died being an infant of 12 years of age, *Jane* the eldest daughter being then 14 years of age, but that *Theophilus* never demanded her consent, or that she ever refused to give it. The clause that says that if *Jane* or *Mary* do not marry *Theophilus* before their age of 21, that then the trustees may sell, does not give an interest to the trustees till their age of 21. Skinn. 301; Mich. 3 W. & M. in B. R. and 320. Trin. 4 W. & M. in B. R. *Thomas* and *Howell*.

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9. A. devised that his executors should sell lands, and with the money and surplus of his personal estate purchase an annuity of 100*l.* for *J. S.* for life, out of which she should maintain her children, and gave 30*l.* to each child to be raised out of the said annuity and his personal estate. *J. S.* died within three months after the testator. The executors renounced. The administrators of *J. S.* shall compel a sale, and the money arising thereby he paying the children's legacies. 2 Wms's Rep. 308. Mich. 1725. *Yates v. Compton*.

(S. c) Sale directed or compelled by Equity, None being appointed to Sell.

1. **W**HERE a man declares by his will that his feoffees shall alien his land for payment of his debts and dies, now the creditors shall compel the feoffees to alien; per *Fineux*, which was agreed by *Reede* and *Tremaile*. Br. Feoffments al. Uses, pl. 12. cites 14 H. 7. 33. and 15 H. 7. 11.

2. And if the will be that a stranger shall alien to *J. S.* now *J. S.* shall compel the stranger by subpoena to alien to him, and the feoffees cannot alien. Br. Feoffments al. Uses, pl. 12. cites 14 H. 7. 33. and 15 H. 11. per *Reede* and *Tremaile*.

3. But if the will be that the feoffees shall alien the lands for distribution, &c. now none could compel them to make alienation; per *Reede*

Reede and Tremaille; which was agreed. Br. Feoffments al. Uses, pl. 12. cites 14 H. 7. 33. and 15. H. 7. 11.

4. Land was devised to be sold, and the money thereof coming he devised to children, but the land could not be sold, because there was none appointed by the will to sell the same, yet ordered to be sold. Toth. 116. cites 39 Eliz. Hire v. Wordal.

5. By Keeling Ch. J. If lands were *devised to executors to sell* it is assents in them if they sell, and if they do not sell, they are compellable in Chancery; so by Twisden of the *heir*, if there be no other assents. 2 Keb. 324. Hill. 19 & 20 Car. 2. B. R. in case of Martin v. Holmes.

6. The words of the will were these; *my will and mind is, and I do hereby authorize that my executors hereafter named shall sell my lands and woods thereupon growing, to any person or persons, and their heirs, for the best value and with the monies thereby raised to pay all my just debts.* 16 Feb. 1655. the Lords Commissioners assented with judges (the executors being dead) upon view of precedents decreed the heirs to sell. Cited Chan. Cases 180. [471] as the case of Ashby v. Doyl.

7. Devise that his executors should receive the rents, issues, and profits of his real and personal estate, and after payment of his debts to raise portions, and then devises all his lands, after payment, to several persons at future times. The Master of the Rolls declared, that if the rent and profits are not sufficient to pay the debts in a reasonable time, he would decree a sale, and that the sales should be out of all the devisee's lands. 2 Vern. 26. pl. 17. Trin. 1687. Berry v. Askham.

8. In a devise of lands to pay debts, if the creditors bring a bill to compel a sale, the *heir* is generally to be made a party. Secus in case of a trust created by deeds to pay debts. 3 Wms's Rep. 92. Hill. 1730. Harris v. Ingledew.

(T. e) Waived or Disagreed to.

1. IF cestuy que use had willed that his feoffees should make estate to A. for life, remainder to B. in fee. In this case, if A. refuses, yet the feoffees were compellable to make estate to some other for the life of A. the remainder in fee to B. and this immediately; and if it be of land deviseable *remainder-man may enter in the life of the refuser.* D. 310. cites Trin. 37 H. 6.

2. Note; per Bromley Ch. J. and others, where a man devises his land to a stranger for life, the remainder to his son in fee, and dies, the son may wave the devise and claim by descent, and yet he shall not avoid the term, no more than where a man leases for years and dies, the lease is good, and yet the dying seised is good also to toll the entry; for it is not like to the case where the father devises to the son in tail, the remainder to a stranger in fee; there the heir does not

not claim in fee for the loss of the remainder in fee. Br. Devise, pl. 41. cites 2 M. 1.

3. A. devised his land to M. his wife, till P. his daughter should be nineteen then to P. in tail remainder over in fee, and devised further that P. should after her being nineteen *pay M. 12 l. per annum in recompence of her dower*, and if P. failed of payment that M. should have the land for her life. M. before P. was nineteen brought writ of dower and recovered a third part; M. shall not have the 12 l. per annum, after P. is nineteen; for it is against the intention of the will that she should have both and the acceptance of the one is a waiver of the other; adjudged and affirmed in error. Cro. E. 128. pl. 3. Hill. 31 Eliz. B. R. Gollin v. Warburton and Crispe. Le. 136.
S. C.

(U. e) Waived.

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Where, if not waved, it must be taken as the Will gives it.

1. A. seized of lands in fee-simple and fee-tail, and having two daughters B. and C. devises the lands in *fee-simple to B.* and the lands in *tail to C.* If B. will claim part of the intailed lands she must quit the fee simple lands. For she must acquiesce in the will, or renounce any benefit by it. And per Ld. Cowper, in such a disposition it is upon an *implied condition*, that each party acquiesce and release the other, especially where the testator had plainly the distribution of his whole estate under his consideration, as in the principal case. 2 Vern. 581. Hill. 1706. Noys v. Mordant. Chan. Proc.
265. pl. 216.
S. C. but
S. P. does
not appear.
—Gilb.
Equ. Rep.
2. S. C. &
S. P. ac-
cordingly.
—S. C.
cited by
Ld. C.
Talbot and

said, that when a man takes upon him to devise what he had no power to do upon a supposition, that his will be acquiesced under, this court compels the devisee, if he will take advantage of the will to take entirely, but not partially under it as was done in the case of Noys v. MORDANT, there being a *tacit condition annexed to all devises of this nature* that the devisee do not disturb the disposition which the devisor hath made; and that so are the cases that have been decreed upon the custom of London. Cases in equity in Ld. Talbot's time 182, 183. Hill. 1735, in case of Streatfield v. Streatfield.

2. A. by marriage articles *agrees to leave his wife 800 l. &c.* but notwithstanding that, or any thing in the articles she should not be debarred of any thing which A. should give her by will, &c. He by will gave her 1000 l. Per Cowper Ch. the will imports a disposition of the whole estate, and she must renounce the articles or the will; she cannot take by both. And if she will take by the will she must suffer the will to be performed throughout. 2 Vern. 555. Pasch. 1706. Herne v. Herne. S. C. cited
Ch. Prec.
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3. So where the eldest son was intitled by the marriage articles to an equal share of one third of his father's personal estate, and the father left 7000 l. by the will, he must renounce either the will, or the articles and cannot take the benefit of both; and the will, if he

he takes by that, must be looked upon as a satisfaction of what he might claim by the articles. Ibid. 556. S. C.

And where
the will
gave her
her life
in some
leasehold
houses
remainder

4. The *wife of a freeman of London* must content herself to take either by her husband's will, or else by the custom, but must not claim the personal estate by both, unless it be so expressly given by the will. But her claiming her customary part will not bar her claiming freehold estate devised to her by the will. Ch. Prec. 351. Mich. 1712. Kitson v. Kitson.

to J. S. it was decreed per Ld. Macclesfield that she should be allowed a moiety of the value of those houses out of the testamentary part over and above her customary part and so J. S. be let into possession presently. Ibid. — This decree as to the freehold and leasehold devised to her for life was afterwards reversed in the House of Lords. G. Equ. R. 29. S. C. — S. P. per Ld. C. Macclesfield Ch. Prec. 508. Babington v. Greenwood.

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5. By marriage articles 1400 *l. was to be laid out in land and settled on the wife* for life, &c. The husband died without issue before any purchase, but made her executrix and left her more than 1400 *l. personal estate*. Decreed per Harcourt and affirmed per Cowper C. that she may take by the articles, if she insists upon it, but if she takes by the will it must be deemed a *satisfaction* of the articles. Ch. Prec. 400. Pasch. 1715. Linguen v. Souray.

6. A. the ancestor by articles previous to his marriage in 1677, agreed to settle certain lands to the use of himself and M. his intended wife for life, remainder to the heirs of the body of A. on M. to be begotten, remainder over; A. made a settlement in 1698, but not pursuant to the articles, and had B. a son and L. and M. two daughters. A. in 1716, upon the marriage of B. settles other lands, in consideration of B's marriage, in the usual manner; and in 1723, levies a fine of the lands in the deed of 1698, to the use of himself in fee; and in 1725, makes his will and devises part of those lands to L. and M. his two daughters, and all the rest of his real estate to trustees to the use of his grandson for life, with remainders to first, &c. son in tail, remainder to daughters, &c. and with direction out of the profits to educate the grandson, and to place out the rest at interest, to be paid to the grandson at twenty-one years of age; and if he does not attain that age, to be paid to L. and M. his said daughters, their executors, &c. Ld. C. Talbot held, that though the grandson is not to be bound by the deed, which did not pursue the articles, yet he decreed him to make his election in six months after he comes of age, either to stand to the will or the articles, and if he chuses to take the lands which ought to have been settled, the daughters (his aunts) shall be reprimed out of the lands devised to him, which shall be conveyed to them in fee. Cases in Equ. in Ld. Talbot's time 176. Hill. 1735. Streatfield v. Streatfield.

(W. e) Qualified or corrected and made good.

1. **A** Devise void in law by reason of a *mis-recital of a grant*, and by reason of an attornment, yet was holden good in equity. Toth. 143. cites 38 Eliz. Bacon v. Bull.

2. *Money devised* by the plaintiff's father to the plaintiffs *out of certain lands* which were to be sold by the defendant, the lands were *intailed* and in the deed there was a proviso, that if the heir went about to sell the same, it should be void, being against the statute of 32 H. 8. It was ordered to be sold. Toth. 184. cites 38 Eliz. Thynn v. Kinsmell.

3. A. makes his *niece executrix*, and after his *wife is privement enfeint* and delivered of a daughter, the will is void by the civil law, but devise of the land is good by our law. Per Jones J. Whitlock J. contra. Palm. 508. Hill. 3 Car. B. R.

4. A legacy was devised to A. of 2000 l. *to be made up of debts* due to testator, and a *schedule* whereof was annexed to the will, but those debts were *deficient* by 300 l. yet assets being confessed the whole 2000 l. was decreed. Fin. R. 152. Mich. 26 Car. 2. Pettiward v. Pettiward.

5. Lands devised to a daughter in sickness, testator *recovers and has a son*, the daughter shall not carry the land from the son. Cited by Ld. Nottingham. 2 Ch. Cases 16. Hill. 31 and 32 Car. 2. in case of Winkfield v. Combe.

2 Vern.
104. cites
Fitzh. tit.
Subpoena.
— S. C.
cited per

Cur. 2 Vern. 416. and says the son was relievable even by the opinion of the judges.

A. being a widower and having a son and several children, married M. who had B. a daughter. A. made his will and devised 1000 l. to B. *his wife's daughter*, and to the child *en ventre sa mere*, if a daughter 1000 l. but if a son, then his executor should purchase 100 l. per annum, and settle on the son in tail-male, remainder to B. the plaintiff. The wife was delivered of a son who died living A. About five years after A. died, and his wife enfeint with a daughter, for whom no provision was left. B. prays the land may be purchased and settled on her; for in a devise of lands in tail, remainder over, if devisee dies without issue the remainder shall take place and this is the same reason here. But per Ld. Chancellor, in a devise I cannot help where the law fixes the estate, but in equity if there falls out an unforeseen accident, which if testator had foreseen he would have altered his will, I shall consider of it; his meaning was to provide for a daughter, in case he should leave one born after his death, and though there was no such daughter (viz. whereof his wife was enfeint at the time of making the will, and to which only the words extend) Yet here is the same in effect. And directed a bill to be brought to which the *posthumous daughter* should be a party, and both cases to be heard together. 2 Ch. Cases 16. Hill. 31 & 32 Car. 2. Winkfield v. Combe.

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6. A. has four daughters, E. F. G. and H. gives them portions (naming them) and appointed his *real estate* to be sold and added to his personal estate; A. has afterwards another daughter named J. who is not provided for by the said will. This daughter J. shall have a share of the real estate appointed to be sold, but not of the particular portions. 2 Chan. Rep. 210. 32 Car. 2. Coles v. Hancock.

7. A. charges lands with a portion for a daughter by a first venter, and then marries and settles part of these lands for the jointure on a second wife, who has no notice of the charge. A. *mis-conceiving*

Chan. Proc.
21. S. C.
but not
fully S. P.
— 2 Vent.

363. Sir
Robert
Reeve's
case S. C.
and S. P.

conceiving and thinking the portion would take place of the jointure, by will gives other lands in lieu thereof. The wife in combination with the heir refused to accept the devise. North K. decreed the daughter to hold such part of the lands devised to the wife as should be of equal value of the lands comprised in the jointure till her portion was raised. Vern. 219. Hill. 1683. Reeve v. Reeve.

8. A. by will gives several legacies and makes *two strangers executors*; he lived many years after, improved his estate much, and *has several children born* since the will, and dies. The court would not make the executors trustees for the children as to the surplus of the estate, but dismissed the bill; per Lds. Commissioners. 2 Vern. 104. Trin. 1689. Hill v. Brewer.

9. One devises to *two of his sisters* 400 l. *a-piece, and to his third sister what his executors should think fit*. The court decreed the third sister should have 400 l. also; and be made equal to her two other sisters, if the estate would hold out. 2 Vern. 153. Trin. 1690. Wareham v. Brown.

10. A. made his *wife and J. S. executors*, his wife being old and unable to get in the estate, and made his wife residuary legatee; the wife died in the life of A. who *left four children*; they brought a bill against the surviving executor, and their bill was dismissed. Cited per Hutchins Commissioner (but names neither time or person.) 2 Vern. 149. Trin. 1690. in case of Cordell v. Noden.

11. A. devises to T. and his heirs, upon trust that he should convey it to such of the relations of the testator as he should think best, and most reputable for his family. A. dies without issue, and the heir at law, who was the testator's brother, prefers a bill against the defendant to have him convey the estate to him. It was in proof on the defendant's part, that the testator before the making of his will did several times declare, that the plaintiff was an ill husband, and would spend his estate if he should leave it to him, and several other expressions shewing the dislike of the testator to the plaintiff. But per Cur. there being nothing in proof against the plaintiff of any misbehaviour since the decease of the testator, this court will judge it most reputable for the family, that the heir at law should have it; and for the discourses which were before the making of the will, those were all at an end by making the will, and notwithstanding all these discourses, it cannot be denied but if the trustee would give it to him, he was not disabled to take it. 2 Freem. Rep. 198. pl. 273. Trin. 1694. Clarke v. Turner.

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12. An estate was devised to be disposed by two trustees to such of his relations as they should think fit, and they disagreed and thereupon this court decreed it to be conveyed to the heir at law. 2 Freem. Rep. 199. in pl. 273. Trin. 1694. cited as the case of Mosely v. Mosely.

13. A. being single made his will, and devised all his personal estate to J. S. Afterwards A. married, and had *several children*, and died without other will or disposition, and now coram delegatis, of whom

s Vern. R.
104. Hills
v. Brewer.
S. P. But
bill dis-

whom Treby Ch. J. was one, it was ruled that there being such an *alteration in his circumstances* and estate, so different at the time of his death from what they were at the time of making the will, here was room and * *presumptive evidence to believe a revocation*, and that the testator continued not of the same mind. 2 Salk. 592. pl. 2. Mich. 8 W. 3. B. R. Lugg v. Lugg.

relations. In Overbury's case they were relations.——A. by contrivance of B. his nephew made a will and B. executor, and said nothing in his will of his personal estate, which by this means the executor claimed, though the testator left a son; but it appearing by several matters that A. intended it for his son, &c. Decreed for the son (an infant) and defendant to be examined on interrogatories, and to be restrained from confessing judgments, &c. to creditors of testator, and the custody of the infant taken from him. Fin. R. 351. Pasch. 30 Car. 2. Corfellis v. Corfellis.

* But that is only a presumptive revocation, and therefore if by any expression or other means it had appeared that the intent of it was that it should continue in force, the marriage had not been a revocation, and the sentence given in the spiritual court was affirmed. 12 Mod. 236. Mich. 10 W. 3. Lugg v. Lugg.

14. A. was seised of Black-Acre in fee, and White-Acre, in tail, and having two sons, devised the tail-acre to his youngest son, and the fee-acre to his eldest son. The eldest entered upon the tail-acre; whereupon the youngest brought his bill, either to enjoy the tail-acre, or to have an equivalent out of the fee-acre; and per Cowper C. this devise being designed as a provision for the youngest son, the devise of Black-Acre to the eldest son must be understood to be with a tacit condition to suffer the youngest son to enjoy quietly, or else that the youngest son should have an equivalent out of the fee-acre, and decreed accordingly. G. Equ. R. 15. Hill. 7. Ann. Anon.

The father thinking the land to be freehold, gives part to his younger son. An old sleeping in-tail shall not prejudice the younger. Toth. 116. cites 18 Car.

Pountney v. Pilkington.

15. A. devised lands to his eldest son; and other lands to his youngest son in tail, and if both his said sons die with (instead of without) issue, then the whole to Burr and his heirs. Both the sons died without issue. The jury (taking the will in such sense as was consistent with reason and good sense) found for Burr the plaintiff. 8 Mod. 59. Mich. 8 Geo. 1. Burr v. Davall.

16. A man devised to the now defendant by the name of his youngest son John and his heirs, all his estates in W. and in case his son should not live to attain the age of 21, leaving no issue lawfully begotten, he devised the estates to the plaintiff Elizabeth his eldest daughter and the heirs males of her body, with like limitations over to his other daughters; and in case his son should attain the age of 21 years, then he devised the estates to be sold, and the money arising from such sale he devised amongst all his daughters as an augmentation to their fortunes. There was a great deal of timber upon the estate, which John the son was cutting down, and now they moved for an injunction to stay him.

Coram Lord Hardwicke, Lincoln's-Inn Decem. 19, 1744. Robinson v. Lytton.

Solicitor-General for the Injunction said, there were many cases where this court would grant such injunctions in favour of persons not intitled to an action of waste at law, as where there is tenant for life, remainder for life, reversion in fee, so for an infant in ventre sa mere, and cited Freeman's Reports Trin. Term 1680. And Lord Chancellor was of opinion, that he ought to grant an injunction;

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junction; he said he thought he was to be considered as a trustee of the inheritance for the benefit of the daughters, and that it was the intention of the testator, he thought, to give him the beneficial interest, but that it would be strange if he was to take away under such a devise the greater part perhaps of the estate.

He said, though there had been no case determined where this court had granted an injunction to stay waste for an infant in ventre sa mere, yet he should not scruple to do it if such a case should happen, and he should be inclined to restrain an heir at law in case of an executory devise.

Injunction granted, and made perpetual.

Note, the particular reason upon which he founded his judgment he declared to be, because he looked upon the devisee John as a trustee by the intention of the testator.

(X. e) Money devised to be invested in Land, and Vice Versâ. How construed in Equity.

1. **I** give Martha my youngest daughter the sum of 400 l. to be paid unto her by my executors within one year next after my decease. But I will and my desire is, that Cornelius Collet (the husband of Martha) upon the payment of the said 400 l. shall give such security as my executor shall approve of, that the said 400 l. shall be laid out within 18 months next after my decease, and purchase an estate of that value to be settled and assured upon her the said Martha and the heirs of her body lawfully begotten. Martha died within four months after the testator, leaving issue a daughter, who died within four months after her mother. The 400 l. was decreed to the husband, who had taken out letters of administration to his wife and daughter. 2 Vent. 355. Trin. 34. Car. 2. Collet v. Collet.

2. A. had two daughters B. and C. A. made her will and devised 200 l. to her daughters to be laid out (by trustees in the will named) in lands and settled to the use of C. and her heirs of her body, and if she died without issue, then to the use of the children of B. Before the 200 l. laid out C. died without issue; B. having issue D. and E. The trustees purchased land, and settled it on D. and E. and D. died, leaving F. a daughter. Decreed the whole to survive to E. If the money had not been actually laid out in a purchase F. would be intitled to a moiety, for then there would have been no survivorship. Carth. 15. Mich. 3 Jac. 2. in Canc. Anon.

3. Where money is devised to be laid out in land, and settled to the use of A. in tail, remainder to B. Chancery ought not to decree the money to be paid to A. though he will have power over the land when purchased and settled by suffering a recovery, but the trust ought to have been strictly pursued, and the money invested in land, and settled according to the will, and then the remainder-

man

Wms's
Rep. 90,
91. Pasch.
1706. S. C.
—But
where the
lands pur-
chased are
to be settled

man has a contingency of A's dying before he can suffer a recovery; per Cowper K. 2 Vern. 551. pl. 501. Pasch. 1706. *Le- gatt v. Shewell, & Ux. and Weller.* *on A. and his heirs he may pray to have the money, and that it be not laid out in a purchase, because none have an interest in it but himself. But if he dies before a purchase made, the executor shall have no benefit of the money, but the heir.* Per Lord Macclesfield. Ch. Prec. 548. Mich. 1720. *Scudamour v. Scudamour.*

4. 8000 l. was bequeathed to A. to be laid out in a purchase of land by A. to be settled on A. for life, remainder to B. and his heirs. B. died in the life of A. Afterwards A. died, no purchase being made. Per Lord Macclesfield though A. only was named to lay out the money, yet it was not so personal to her, but her executors were implied and included, and decreed the money to the heir at law of B. though she did not bring a bill in A's life-time to enforce A. to make a purchase, and the rather because the heir was an infant, and so shall not suffer for his laches in not bringing a bill in A's life-time to lay out the money. Ch. Prec. 543. Mich. 1720. *Scudamore v. Scudamore* [477]

(Y. e) Nuncupative Wills and Codicils.

1. A codicil is defined in the civil law, to be an act which contains dispositions in prospect of death, and made without the institution of an executor. And whether a codicil is made at the same time, or before or after the will, or whether the one mentions the other or not, yet the codicil is considered as part of the will. Fin. Rep. 460. Mich. 32 Car. 2. *Rogers v. Bampffield, & al.* And. in Marg. cites Domat 2 Vol. 140.

2. A codicil is part of the will, and the most material part of it, because last made. The very meaning of the name codicil is a little will; and this was determined in the House of Lords, the judges opinions, then attending, being asked on an appeal from Lord Macclesfield's decree, on this question, if this codicil be in a separate writing, and not annexed to the will, but only said to be annexed, whether it was a re-publication of the will? and they held, it was, and that the codicil and will made but one compleat will, and the decree was affirmed. Arg. Fortescue's Rep. 192, 193. Trin. 8 and 9 Geo. 2. C. B. in case of *Acherley v. Vernon.* Comyns's Rep. 381. pl. 190. S. C. decreed, and decree affirmed in the House of Lords.

3. A testament nuncupative is, when as the testator makes his will by words before witnesses. But more properly it is said, a testament nuncupative, when the testator lies languishing for fear of sudden death, dares not to stay the writing of his testament; and therefore he prays his curate, and others his neighbours, to bear witness of his last will, and declares by word what his last will is. And such will is as strong as a testament or will in writing, and sealed with the seal of the testator, if not that it be in special cases, &c. Perk. S. 476.

4. The testator being seized in fee, devised the lands to his wife in recompence of her dower, to hold so long as she should live sole, and
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after the determination of that estate, then to his heir, paying to his wife 26 l. per ann. during her life, and charged other lands, of which he was seised in fee, to pay annuities to younger children, and 1000 l. portion to his daughter; afterwards by a codicil he devised all his lands to trustees, and their heirs, to the use of the eldest son and his heirs, for so long time as he or they should suffer the wife and children quietly to enjoy the annuities and legacies; and if he should interrupt them, then he devised all his fee simple lands to his wife, and to his two younger sons and their heirs. On a reference to the two Ch. Justices Popham and Anderson, they held clearly, that this devise to his eldest son by this codicil was good, and that he had it not by descent, but by purchase, and they thought that the first part of his will was corrected by the codicil. And decreed accordingly. Moor 726. Hill. 38 Eliz. in the Court of Wards. Digby's case.

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5. A. was bound in a bond of 800 l. to B. and B. made his will, and C. executor thereof; and after declared his further will that A. should have the bond, and died. C. proved the will, but omitted this codicil; and to compel him to prove it A. sued C. before the commissioners for probat of wills, &c. Pending which the bond was sued at law; A. having filed this bill for relief, it was resolved that there should be no relief for the legacy before the codicil proved, and that then he should be relieved against the bond, by reason of the legacy; but the court supported the injunction till the hearing before the commissioners. Hard. 96. Paich. 1657. in the Exchequer. Took v. Fitz-John.

6. Nuncupative will is to be proved only in the Spiritual Court, and before probate it is not pleadable in any court against an administrator. Chan. Cases 192. Hill. 22 & 23 Car. 2. Verhorn v. Brewin.

Fjn. Rep.
294. S. C.
decreed ac-
cordingly.

7. I bequeath to K. N. my god-daughter a jewel set with diamonds, wishing her all happiness, and 500 l. to my god-daughter, Mrs. K. S. I give and bequeath a diamond bodkin, and an emrod border; and afterwards by a codicil the testatrix bequeathed to her god-daughter K. N. 500 l. in silver, and to her god-daughter K. S. 100 l. more than she had given in her will. The court decreed the 500 l. in the will as well as the 500 l. in the codicil to Mrs. K. N. 2 Ch. R. 110. 27 Car. 2. Newport v. Kinalston.

* 4 & 5
Annæ, cap.
16. S. 14.
Enacts that
such as are
good wit-
nesses at trials
at common
law shall
be deemed
good wit-
nesses to prove a nuncupative will, or any thing relating therunto.

8. 29 Car. 2. cap. 3. s. 19. No nuncupative will shall be good, where the estate bequeathed exceeds 30 l. that is not proved by the oaths of three* witnesses that were present at the making thereof, nor unless the testator bid them or some of them to bear witness that such is his will, nor unless it were made in the last sickness of the deceased and in the house of his dwelling, or where he had been resident ten days or more, except where he was surprized from his own house, and died before his return.

9. S. 20. After six months passed after speaking the pretended testamentary words, no testimony shall be received of such nuncupative will, unless the said testimony were committed to writing within six days after making the said will.

30. S. 21.

10. *S. 21. No letters testamentary or probate of any nuncupative will shall pass the seal of any court till 14 days after the testator's decease, nor shall any nuncupative will be proved, unless process have issued to call in the widow or next of kindred to the deceased, to contest it if they will.*

11. A. makes his will in writing and B. executor, and gives some legacies, the residuum to B. B. dies in life of A. viz. Sept. 5, 1679. Testator knowing of the death of executor, makes a nuncupative codicil on the 6th Sept. 1679. and gives to C. all that he had given to B. and dies 13th Sept. 1679. This is a good disposition. The nuncupative will being *quasi a new will* for the residuum, (which devise became totally void by death of B.) and makes no alteration of the will as to so much. There being now no such will, its operation being determined. Raym. 334. Mich. 31 Car. 2. Stonywell's case.

12. If part of a will in writing be made by force or fraud, such part may be disposed by a nuncupative will, which will be an original will for so much. For such part so obtained is void, and no part of the will, (so that it is as a part of estate undisposed of.) Per Commissioners Delegates. Raym. 334, 335. Mich. 31 Car. 2. in Stonywell's case.

13. If A. possessed of an estate of 1000 l. and by will in writing gives 500 l. of it to B. A. may give the residue by a nuncupative will, *so as he do not alter the executor.* Raym. 334. Mich. 31 Car. 2. in Stonywell's case. By Commissioners Delegates.

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14. A. makes his brother executor, and devised to his executor all his real and personal estate, and afterwards A. marries, and by a codicil makes his wife executrix; it was urged that the brother does not take as executor only, but by express words of gift in the will. But by Finch C. the wife shall have the personal estate, and not the brother, for it was intended him only as executor. Vern. 23. pl. 16. Mich. 1681. Wilkinson v.

S. C. cited
2 Vern. 302.
in case of
Cutler v.
Coxeter.
And. Ibid.
309. pl.
299. Hill.
1693. in
case of

Barton v. Barton.

15. The testator devised all his real estate to his executors and their heirs, in trust that they out of the rents and profits, &c. should pay his debts and legacies, and gave 1800 l. legacy to one Winter, the like sum to one Bamfield, and 2500 l. to one Warre his sister, the lady Drax, and having 7500 l. in his closet, he by a codicil declared his mind to be, that all the money in his closet should be disposed by Ann Rogers the plaintiff, amongst such poor people, and in such manner as he had directed her; and gave the keys of his closet where the money was to the said Ann, and soon after died. The executors took the money out of the closet, and paid the greatest part of the money to the legatees; and the legatees having received their several legacies out of the money in the closet, it was decreed they should re-pay it, and that the same should be applied according to the direction and intention in the codicil, the plaintiff giving security for that purpose. Fin. Chan. Rep. 460. Mich. 32 Car. 2. Rogers v. Bamfield.

16. A citizen and freeman of London seised of lands, &c. and a personal estate by will nuncupative, on his death-bed declared, viz. I hear that J. R. (who was heir at law) is inquiring after my death, and therefore I am resolved to leave him nothing but what my father gave him by his will; I give all my estate to my wife. Pollexfen said, that a nuncupative will being *inrolled by virtue of the custom of London*, is all one as a written will; the court inclined accordingly. And the reporter says, that in the case of CARTER v. HORNER. Pasch. 4 W. & M. Northey affirmed this case to be adjudged, that all passed to the wife in fee, and that it was so enjoyed accordingly, *ex sua certa scientia*. Skin. 193. Trin. 36 Car. 2. C. B. Anon.

17. A. seised in fee of lands *limits a term for 100 years to trustees, for such uses as he by deed or will should appoint, and for want of such appointment, to attend the inheritance*; A. being a bastard made a nuncupative will in these words, viz. *I give all, all to J. S. and then died without issue*; Ld. Chancellor agreed, that before the statute of frauds, &c. a man might dispose of a trust by parol, and that the words *all, all, are sufficient to pass a term for years*; but in this case the term being expressly settled by deed for such uses as he should appoint, and for want of such appointment, to attend the inheritance, this restrains him from making any parol disposition, and the words *all, all, must be intended of all he could dispose by parol*. Vern. 340. pl. 333. Mich. 1685. Thruxton v. Attorney-General.

[480] 18. A. being very ill, desired B. to make her will, who wrote down only names and initial letters to this effect, viz. *to Tho. West 200 l. to Jo. Dav. 100 l. to Reb. Cro. 50 l. to Sis. to Self 10 l. and to several other persons in like manner, to above 400 l. which being more than her estate B. made an alteration in a second column, by subtracting part of the sums from some of the legatees, as set down in the second column, and then told A. the sense of the proposed devises*; there were two persons in the room that did not hear any thing that passed between A. and B. but only heard the testatrix at last pronounce, that all was well; B. went to a scrivener to have the devises drawn out at length and in form, and before she returned the testatrix died; the judge below pronounced for this will, but upon an appeal to the delegates it was reversed; and in this case it was agreed, that if the will had been written in words at length, so as they had carried a sense and meaning in themselves, it had been a good will; for that there was one witness that wrote it, and two that heard the testatrix pronounce that it was well, which would have been intended to have amounted to a second witness, in regard it appeared on all hands by several witnesses, that the testatrix did then seriously dispose herself to the making her will; and distinguished this case from the case of one PEPPER, where a person disposed herself to make her will, and dictated it to a person, who wrote it down; and another, not called in as a witness lay behind the hanging out of curiosity, and yet such will was allowed to be good, being proved by these two witnesses. But because this will was not substantive, but was to take its sense from the interpretation of the witnesses, and so there would be inuendo, upon inuendo, which made it purely a nuncupative will; and such

such not being attested by the number of witnesses appointed by the statute of frauds and perjuries, the will and legacies were void. Abr. Equ. Cases 404. 26 Feb. 1710. Davis v. Gloucester.

19. Dr. Shallmer by will in writing gave 200 l. to the parish of St. Clement's Danes, and after Prew the reader coming to pray with him, his wife put him in mind to give 200 l. more towards the charges of building their church, at which though Dr. Shallmer was at first disturbed, yet *after said he would give the other 200 l. and bid Prew take notice of it*, and the next day bid Prew remember what he had said to him the day before, and dies that day. *Within three or four days after the doctor's wife puts down a memorandum in writing of the said last devise, and so did her maid; Prew died about a month after, and amongst his papers was found a memorandum of his own writing, dated three weeks after the doctor's death of what the doctor said to him about the 200 l. and purporting that he had put it in writing the same day it was spoken, but that writing which was mentioned to be made the same day it was spoken did not appear, and these three memorandums did not expressly agree.* About a year after, on application by the parish to the Commissioners of charitable uses, and producing these memorandums, and proof by Mrs. Shallmer and her maid, they decreed the 200 l. but on exception taken by the executors, the decree was discharged of this 200 l. and my Ld. Chancellor held it *not good, because it was not proved by the oath of three witnesses*; for though Mrs. Shallmer and her maid had made proof, yet Prew was dead, and the statute in that branch requires not only three to be present, but that the proof shall be by the oath of three witnesses. Abr. Equ. Cases 404. Trin. 1704. Philips v. the Parish of St. Clement's Danes.

20. Feme before marriage saved 350 l. out of her maintenance money, which was in her brother's hands. The brother gave a bond for it to the baron, but the steward proving that the baron said his wife should have the 350 l. and that it should be placed out for her benefit; and having also a little before his death said, *he gave it to his wife*, and three persons present wrote it down and attested it as witnesses, though not by baron's direction or with his knowledge, and though the baron after made two codicils, and in one of them devised several things to the wife, but took no notice of the 350 l. or the bond for it, yet Cowper C. decreed it for the wife, not as a gift from the baron, but *as declared and intended originally for her separate use.* 2 Vern. 748. Hill. 1716. Earl of Shaftsbury v. Countess of Shaftsbury.

For more of Devise in General, See **Executor**,
and other proper Titles.

Dilapidations.

(A) Cases relating to Dilapidations.

1. **I**F a bishop, archdeacon, parson, or the like, abates all the wood upon the land, he shall be dilapidator; per Thirwit, but per Thyrning there is no remedy for this by the common law. Br. Deposition, pl. 1, cites 2 H. 4. 3.

The executors were liable to answer by the ecclesiastical law before this act. Wentw. Off. Executors. 127.

2. 13 El. cap. 10. If any ecclesiastical persons, who are bound to repair the buildings whereof they are seised in right of their place or function suffer them to fall into decay for want of repair and make fraudulent gifts of their personal estate with purpose to hinder their successors from recovering dilapidations against their executors or administrators, in such case the successors shall have like remedy in the ecclesiastical court against the grantee of such personal estate as he might have against the executor or administrator of the predecessor.

3. 14 El. cap. 11. All monies recovered for dilapidations shall within two years be employed upon the buildings for which they were paid, in pain to forfeit to the queen, &c. double so much as shall not be so employed.

Roll. R. 167. 4. Dilapidation of the house of the bishoprick is good cause of deprivation. Roll. R. 86, pl. 34. Mich. 12 Jac. B. R. Stockman v. Wither.

Harvy. — So if he cuts down all the trees. 11 Rep. 98. b. in Bagg's case. If any ecclesiastical person do or suffer to be done any dilapidations, they may be punished for the same in the ecclesiastical court, and a prohibition will not lie in the case, and the same is good cause of deprivation of their ecclesiastical livings and dignities. But yet for such waste done they may be punished also as common law, if the party sue there. Godb. 259. pl. 357. Bishop of Sarum's case cites 2 H. 4. 3.

2 Bulst. 279. 5. If a bishop cuts and sells trees and does not employ them for reparations, a prohibition ought to be granted out of B. R. to him. Roll. R. 86, pl. 34. Mich. 12 Jac. B. R. Stockman v. Wither.
S. P. — and the same of a dean and chapter.
3 Bulst. 158
Knowl v. Harvy. S. P.

6. A bishop is only to fell timber for building, for fuel, and other necessary occasions. The woods are called the dower of the church; Per Coke Ch. J. 2 Bulst. 279. Mich. 12 Jac. Anon.

7. Coke Ch. J. said he had seen a record 25 E. 1. where complaint was made in parliament of the Bishop of Durham for cutting down timber trees for his coal mines; and there it was agreed, that in such a case a prohibition did lye, and a prohibition was granted in B. R. 2 Bulst. 279. Mich. 12 Jac. Anon.

3 Bulst. 158. 8. Vicar had cut several great timber trees and did not repair the church with them, and on suggestion of this to the court, and that he would

would cut more trees in like manner, a *prohibition* was granted per Cur. by the common law. Roll. R. 335. pl. 44. Hill. 13 Jac. B. R. Knowle v. Harvy.

9. Any person may sue out a *prohibition* against a parson that is cutting down trees and not repairing the church with them. Roll. R. 335. pl. 44. Hill. 13 Jac. Knowle v. Harvey.

10. If a *bishop cuts and sells the trees of his bishoprick*, for this waste a *prohibition* shall be granted to him, commanding him to cease doing such waste. M. 12 Jac. B. R. per Cur. Hill. 13 Jac. B. R. 35 E. 1. Resolved in parliament. The Bishop of Durham's case cited 11 Rep. Co. 49. a. in Liford's case.

11. In case of dilapidations the whole ought not to be *sequestered*, but to leave a proportion to the parson for his livelihood. 2 Vent. 35 Pasch. 32 Car. 2. Per Cur. in case of Walwin v. Auberry.

12. Dr. Sands, a *residential prebendary* of the church of Wells, brought a suit in the spiritual court for dilapidations against the executors of Dr. Pierce his predecessor; and they on the other side came and shewed, that in that church there are eight *residential prebendaries*, to which, to encourage them to residence, there are eight houses belonging, that *to each prebend there is an house belonging, but not any house in certain, the bishop having the privilege of appointing what house he thinks fit to each prebendary*, but he must appoint one. They hence inferred that this house goes not in succession, nor is it part of the corps of the prebend for that he is prebendary, and hath one house allotted him, and so was Dr. Sands; and afterwards upon the death of another prebendary, another house. But Jones J. answered, It is true, here are eight houses, belonging to eight *residential prebendaries*, whereof each prebendary de jure is to have one; that no one house is *ascertained to any particular prebend*, or is parcel of any particular prebend, but ought to be assigned to some particular prebend, and when the bishop doth so assign by virtue of his power and not by virtue of any estate he had in him, then it is *part of the prebend*, and shall be liable to a suit for dilapidations; wherefore there ought to be no prohibition. Skin. 121. pl. 18. Trin. 35 Car. 2. B. R. Dr. Sands case.

13. Dr. W. Bishop of L. and C. was suspended by Archbishop Sancroft for dilapidations, and the *profits of the bishoprick were sequestered*, and the *episcopal palace* built out of them. Cited 12 Mod. 237. as the case of Dr. Wood Bishop of Litchfield and Coventry, 1687.

14. In a *general pardon* dilapidations were excepted, unless suit be commenced and depending before such a day. Upon a suit commenced after the day, the whole court conceived that the parliament never intended to take away the *successor's remedy* for dilapidations; but they would intend this exception of such suits, as might be in the ecclesiastical court *ex officio*, against the dilapidator himself to punish it as a crime against the ecclesiastical law, and to pardon it unless there were prosecution before the day aforesaid. 2 Vent. 216. Mich. 2 W. & M. in C. B. Anon.

15. In action on the case for dilapidations by successor, the declaration was *upon the custom of the realm* and held good. 3 Lev. 268. Pasch. 2 W. & M. in C. B. Jones v. Hill.

* Godolph.

173. 249. 3

Buls. 91, 92.

153. 2 Buls.

227. 11 Rep.

49. 72. Tr.

10 H. 7.

Rot. 09.

P. 13. H. 8.

Rot. 126.

H. 15. H. 8. Rot. 306. H. 15. Ja. Rot. 474.

S. C. 3 Lev. 268. says that Pollexfen Ch. J. who tried the cause, then was, and continued * of opinion afterwards, that it was suable only in the Spiritual Court. That upon search of some of the cases cited no judgment was given but only a verdict and divers continuances entered. But that Mich. 3 Jac. 2. Rot. 332. between DAY & HOLLINGTON in such case judgment was given for the plaintiff upon a demurrer. But that the court (of C. B.) now inclined to the opinion of Pollexfen; but the case was ordered to be put in the paper to be further argued and after in Trin. Term Pollexfen & Ventris being dead, the case was argued again before Powell and Rookby J. and they gave judgment for the plaintiff; Levins counsel for the plaintiff.

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17. A prohibition was moved to the ecclesiastical court for dilapidations, upon suggestion that the plaintiff in the ecclesiastical court had brought a suit at common law, for the same dilapidations, in which action the defendant pleaded tender of 10l. which was sufficient to repair the said dilapidations, and the plaintiff took issue that the 10l. was not sufficient, and the verdict found it sufficient; upon which judgment was given for the defendant and he pleaded this judgment in bar, to the suit in the ecclesiastical court, which they refuse to receive and the court granted a prohibition; but afterwards, Treby Ch. J. hesitante, adjournatur to the next term. 3 Lev. 413. Hill. 6 W. 3. C. B. Okes v. Ange.

See Tit. Prerogative (R. e) pl. 1. and the notes there, and other proper Titles.

* Dilatories.

* Dilatories

are not fa-

voured. Br.

Dilatories

pl. 5. cites

35 H. 6. 59.

(A) What Plea shall be said Dilatory.

1. A Man shall not falsify in dilatories; as in *outlawry*, *excommunication* in the demandant, &c. nor by *entry of the demandant* into the land *pending the writ*; nor because the land was in *ancient demesne*, &c. for these do not disprove the title of the demandant;

mandant; per Fortescue Ch. J. Br. Fauxif. de Recov. pl. 15. cites 36 H. 6. 32.

2. *Formedon in remainder, &c. disclaimer is not dilatory, but rather peremptory*; for by this the demandant cannot enter. Br. Dilatories, pl. 13. cites 5 E. 4. 46.

3. *Præcipe quod reddat against four; three confessed the action and the fourth pleaded jointenancy with two absque hoc that the third any thing had*; and per Fitzh. the demandant shall not recover against the three till the issue be tried; for this is several tenancy which goes in abatement of all the writ, and so he shall have the plea, clearly; quod nemo dedixit; for this is not properly dilatory, as it seems, Br. Dilatories, pl. 2. cites 27 H. 8. 30.

(B) Several Defendants. In what Cases they must [484] agree in Dilatories.

1. *P RÆCIPE quod reddat of land in B. against two, the one demanded the view, and the other said that there are two B's and none without addition; judgment of the writ, and could not have the plea, for they ought to agree in dilatories, and the other has affirmed the writ by demand of the view.* Br. Dilatories, pl. 18, cites 21 E. 3. 52. and Fitzh. Brief. 307.

2. *Præcipe quod reddat against two, the one cannot demand the view and plead to the writ.* Br. Dilatories, pl. 19. cites 21 E. 3. 52. and Fitzh. Brief. 307.

3. And see there 923. *Debt against baron and feme and J. S. the feme pleaded to the action, the Baron and J. S. shall not plead to the writ.* Ibid.

4. *Affize against the baron and feme, the baron pleaded villenage to J. S. by which the plaintiff took a new writ against the baron and feme, and J. S. and the baron pleaded villenage to W. P. & non allocatur*; for the plaintiff shall not be twice delayed by villenage; for so it may be infinite. Br. Dilatories, pl. 15. cites 22 Aff. 12.

5. *Præcipe quod reddat against two, the one cannot plead to the count, and the other to the writ.* Br. Dilatories, pl. 16. cites 42 E. 3. 17.

6. *Nor can the one pray the view if the other pleads in bar.* Ibid.

7. *Nor if they take the tenancy jointly can the one vouch one of his part, and the other vouch another of his part*; for they ought to agree in dilatories. Ibid.

8. *But in the last case of voucher they may vouch severally by 12 H. 7. 1. if they shew causes.* Ibid.

9. *Formedon against five as jointenants, the one disclaimed, another took the intire tenancy, absque hoc, that the others any thing had, and vouched, &c. The third said that he was tenant of the whole, and traversed the gift; the fourth made default, and nothing of their pleas was*

was entred, but their presence recorded, and petit cape against him who made default, and idem dies given to those who appeared; for no issue shall be taken, till he who made default has lost his answer; for it may be that he is tenant of the whole, and shall save his default, and then it is no reason to forejudge him of his tenancy; and though he cannot take the tenancy and save his default, yet the demandant shall not have seisin of the 5th part before the issue taken, which is tendered by the others; for then he shall recover the 5th part per mie & per tout, or perhaps one of them who has pleaded to issue may be found tenant of the whole. Br. Dilatories, pl. 17. cites 46 E. 3. 15.

But 11 H. 4. 59. he was permitted to have the voucher. But 9 H. 6. and 22 H. 6. 39. agrees with 7 H. 4. 10. In *formedon*, the tenant said, that A. and B. leased to him for life, and prayed aid of them and had it; the sheriff returned the one dead, and the other did not come, by which he was awarded to answer alone, wherefore he vouched the other prayee, and was ousted by award; for he had one delay by him before. Br. Dilatories, pl. 14. cites 7 H. 4. 15. by the best opinion. Ibid.

11. Where action is brought against two, the one only may disclaim though the other will not. Br. Dilatories, pl. 13. cites 5 E. 4. 46.

[485] 12. In *scire facias* three recovered damages in assise, whereof two brought *scire facias* against two, and supposed the third who recovered to be dead, and one of the defendants said, that he who is supposed to be dead is alive, and the other said, that the one of the two plaintiffs is dead, and each concluded to the writ, and therefore ill; for he cannot sever in dilatories; contra of pleas in bar, which goes in discharge of the action, be the action real or personal. Br. Dilatories, pl. 11. cites 7 H. 7. 5.

13. In *formedon* by the best opinion, the tenants may vouch severally, or the one may vouch and the other plead in bar. Per Vavisor. Br. Dilatories, pl. 12. cites 12 H. 7. 3.

14. And by him, the one may plead in bar, and the other may vouch or pray in aid. Ibid.

15. But the one cannot plead to the writ, and the other demand the view. Ibid.

16. Nor can the one pray in aid of one, and the other of another. Ibid.

17. *Formedon* against two feoffees, the one would not do otherwise than confess the action or plead in bar, and the other would vouch as *cestuy que use* informed him, and it was moved whether the one may vouch, and the other plead in bar. And per Fitzherbert J. they cannot vouch unless both vouch and the other shall have his *warrantia chartæ*. Per Brook J. it is not so; For if the one confesses or renders the action, yet the other shall have his voucher. But 42 E. 3. 17. & 15. and 15 H. 7. 1. is that they cannot vouch severally nisi ostenderint causam. But this does not prove but that the one may vouch and the other plead in bar. But where warranty is made to two, the one alone cannot deraign it, 48 E. 3. 17. the reason seems

seems to be inasmuch as the voucher is in lieu of action, and the one shall not have action which belongs to two. Br. Dilatories, pl. 8. cites 14 H. 8. 24.

18. *Præcipe quod reddat against two*, the one prayed the view, and the other imparled, and per Fitzh. he shall have the view; quod nota; for it appears elsewhere that they ought to agree in dilatories. Br. Dilatories, pl. 1. cites 26 H. 8. 2.

(C) In what Actions allowed or not.

1. *IN quare impedit* a man shall not have age nor other delay, for the lapse of time; as protection, nor does essoign de servitio regis lie, &c. Br. Dilatories, pl. 10. cites 43 Aff. 21. Per Thorpe.

2. 4 & 5 Ann. cap. 16. s. 11. Enacts that no dilatory plea shall be received in any court of record, unless the party offering such plea do by affidavit prove the truth thereof, or shew some probable matter to the court, to induce them to believe that the fact is true.

For more of Dilatories in general see other proper Titles,

Disabilities.

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(A) What are, and the Effect thereof.

And Pleadings.

1. *DEBT* upon an obligation the defendant pleads, that at the time of the obligation made he was *non sanæ memoriæ*, and it was thereupon demurred, and adjudged to be no plea; for he cannot save himself by such a plea, and the opinion of Fitzherbert held to be no law. Wherefore it was adjudged for the plaintiff. Cro. E. 398. pl. 4. Trin. 37 Eliz. B. R. Stroud v. Marshall.

So in case against an inn-keeper upon the common custom of the realm, for not

keeping safely his guest's goods, he cannot disable himself by pleading *non sanæ memoriæ*, any more than in debt on an obligation. Cro. E. 622. pl. 13. Mich. 40 & 41 Eliz. B. R.

2. If I am bound to *infeoff* A. and before the day I marry her, the bond is forfeited. Brownl. 62. by Ld. Coke. Trin. 7 Jac. cites 18 E. 4. 18. 20.

3. If

3. If a man be bound by his *bond to sell* a house to J. S. and after he *sells to a stranger* the same house; by this sale, the bond is forfeited notwithstanding that afterwards he doth *re-purchase* the same house again. Per tot. Cur. 1 Bullf. 117. Pasch. 9 Jac. Anon.

4. There is a difference where a man is bound to *deliver a thing* which is in his *own possession*, or in the possession of another, or which is not in his own possession; as in the first case to deliver a horse or a dog, for he may secure such in his stable from casualties; but seats in a church, and which were the property of the plaintiff himself, so that defendant could not possibly secure them in his own house without subjecting himself to an action if they are pulled down, so that defendant cannot deliver them according to an award, it is a good plea for him that they were pulled down without his knowledge. Arg. curia advisare vult. 2 Mod. 27. Pasch. 27 Car. 2. C. B. Bridges v. Bedingfield.

Carth. 306.

S. C. —

Cumb. 317.

S. C. —

2 Vent. 248.

S. C. cited. —

12 Mod. 67.

S. C. —

So in case

of felony or

outlawry.

Noy. 1.

Hastings v. Blake.

5. No man can *take advantage* of his own disability; as no man can plead that he is a fool, or non compos mentis, but if a *non compos* is indicted, the judges must acquit him ex officio; for the king takes care of all such persons. But if a man is disabled by judgment to bear an office, he is excused; for judicium redditur in invitum. But where he can *remove the disability*, as in case of *excommunication*, he shall take no advantage of his disability. 1 Salk. 168. Hill. 6 W. & M. in B. R. Per Holt Ch. J. and Eyre J. in case of the King v. Larwood,

6. Matter of disability which might have been *pleaded to the action*, is not pleadable to the *sci. fa.* on judgment. 1 Salk. 2. pl. 5. Pasch. 1 Ann. B. R. West v. Sutton.

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7. A remainder was *limited in trust for a papist for 99 years, remainder to his issue male*, who is disabled to take by the statute 11 and 12 W. 3. 4. and an *after remainder was limited to a protestant*. Two several bills were brought in Chancery, one by the protestant remainder-man, and the other by the heir at law, after the death of the donor, against the papist to be let into possession of the premises. The protestant remainder-man insisted that the limitations to the papist being void, he was therefore to *take presently*. The heir insisted that the said remainder-man was not to take *until the papist should be dead without issue*; and that an *interim estate should descend to the heir* as undisposed of by the person that made the settlement. See Wms's Rep. 352, 353. Trin. 1717. Vane v. Fletcher.

8. After a lease granted, lessor disables himself (by a settlement by which he makes himself only tenant for life) to *perform the covenants in the lease*, as to grant a new lease with certain advantages to lessee, yet this *after-settlement shall not prejudice lessee*, nor forejudge him of the benefit of any covenant in his life. 9 Mod. 59. Mich. 10 Geo. in Canc. Ashton v. Bretland.

9. If a *testator* be under a disability at the time of making his will, though that disability be actually removed before his death, yet the will

As if made
by an infant
or *fove co-*
vert, and af-

will be absolutely void, because he had no ability at that time. Per Holt Ch. J. Gibb. 226. in the case of Bunker v. Coke. ter the infant comes of age or good. Ibid.
 the feme buries her husband, 11 Mod. 123. S. C. — But a new publication would make it good.

For more of Disability in General, See *Alien, Condition, Infant, Reculant, Attlawry*, and other Proper Titles.

Disagreement.

(A.) Disagreement as to Lands and Chattles, Good and Necessary, in what Cases, and the Effect thereof.

1. **T**HE defendant was bound that *if T. N. be not well content at his coming from beyond sea with the presentment of J. to the church of P. that then he should resign, &c.* and said that T. N. such a day and year agreed, &c. and the plaintiff said that such a day and year before he disagreed, &c. Br. Conditions, pl. 30. cites 46 E. 3. 5. But Brooke says quære; for 14 H. 8. 2. it is said, that the *first act, be it agreement or disagreement, makes an end of all*, if no day be limited; but where day is limited, and he agrees before the day, this is sufficient, though he disagrees before also.

2. If a lease is made to A. for life, remainder to B. and after A. dies the law adjudges the frank-tenement in B. till he disagrees or disclaims, and by the waiving thereof it vests in the donor or his heir. Br. Done, &c. pl. 7. cites 50 E. 3. 21. [488]

3. So in the case of descent or escheat. Br. Done, &c. pl. 7. ut sup.

4. If a fine is levied to two, and one does not enter nor say any thing, and the other enters and is impleaded, there per Hank. he may plead jointenancy with the other, notwithstanding that *he alone counts of the possession*, and that the other never entered; for the possession by the fine and the entry of the one shall be adjudged in law to be in both till the other disagrees by matter of record, and so see that disagreement to relinquish a thing shall not be but by matter of record, but agreement to take a thing may be by parol or matter in deed. Br. Jointenancy, pl. 57. cites 8 H. 4. 13. Br. Agreement, pl. 8. cites S. C.

5. If a man makes a gift of his goods to me by deed in my absence, this is good without livery made to me of the deed, till I disagree to the

23. A. makes a bond to B. and delivers to C. to the use of B. It is the deed of A. immediately, but B. may refuse it, and by that the bond will lose its force. So of a gift of goods and chattles, if A. delivers a deed to the use of B. the goods and chattles are in B. immediately * before notice or agreement, but B. may refuse, and by that the property and interest shall be devested; per Gould J. 1 Salk. 301. Hill. 1 Ann. in case of Wankford, v. Wankford.

For more of Disagreement in General, see Disclaimer, and other proper Titles.

Disceit.

(A) In what Cases it lies [on Real Actions.]

Cro. E. 371. pl. 14. Collet v. Marsh. S. C. the court doubted, and adjournatur. — Ibid. 397. pl. 2. S. C. Popham and Fenner conceived that the party might have a writ

[1. **I**N a *præcipe quod reddat*, if the tenant be summoned upon the land according to the common law, and the summons returned, and the tenant makes a default, upon which a grand cape issues, and thereupon judgment is given, the tenant may have a writ of disceit by the equity of the statute of the 31 *El. Cap. 3. for that he was not summoned at the parochial church* according to the said statute, for this is not error, and so he is without remedy for the land, which was the mischief before the statute, and he can only have an action upon the case against the sheriff, if he cannot have this writ. H. 37 Eliz. B. R. between Collet and Marshall held; for the statute intends to put it in equal degree with a non-summons at common law.]

of disceit if the proclamation of summons was not according to the statute; for now he is not summoned according to law; but Clench and Gawdy e contra, because it is a good summons by the summoners on the land. — Mo. 349. pl. 467. Corbet v. Marsh. S. C. and because the sheriff had returned him summoned and proclaimed, the court gave judgment accordingly, and put the party to his remedy against the sheriff.

2. If a man *sues a protection and does not go*, this writ lies; contrary, if he goes, though he presently returns. F. N. B. 97. (B) in the Marg. cites 44 H. 3. 4.

3. In affize, if a man *finds pledges in my name* in affize brought against me by which I lose the land, I shall have action of disceit. Br. Disceit pl. 36. cites 8 H. 4. 7.

4. If a man *sues execution* against the conusor upon a statute staple as executor of the conusee where he is not executor, or where the conusee is alive, the conusor may have writ of disceit. Br. Disceit, pl. 34. cites 2 R. 3. 8.

5. This

5. This writ lies properly where *one man does any thing in the name of another, by which the other person is damnified and deceived*; then he who is so damnified shall have this writ. F. N. B. 95. (E).

And note; such writ lies notwithstanding the record on which it is

founded by cancelled or avoided before. F. N. B. 95. (E) in the new notes there (a) says see 17 E. 3. 18. S. 1.

6. If I present one unto a church whereof I am the patron, to the ordinary, and one T. does disturb, for which disturbance another does purchase a quare impedit in my name returnable in C. B. against the said T. I not knowing thereof, and afterwards causes the writ to abate or me to be nonsuit in that writ, I shall have this writ of disceit against him who purchased that writ, &c. F. N. B. 96. (A). [491]

7. If one forge a statute-merchant in my name and sues a capias thereupon, for which I am arrested, I shall have this writ of disceit against him that forged it, and against him who sued forth the writ of capias, &c. F. N. B. 96. (B).

Ibid. in Marg. cites 19 H. 6. 44. If a man makes an obligation

in my name, I shall not have disceit, because I may plead non est factum.

8. If a man procures another to sue an action against me to trouble me, I shall have a writ of disceit. F. N. B. 98. (N).

9. In a præcipe quod reddat against the husband and the wife, at the grand cape the husband appears in person, and the wife appears by attorney, who has a warrant which is sufficient, by which judgment is given, upon the default of the wife, against the husband and wife, &c. Yet they shall have a writ of disceit if they were not summoned, &c. F. N. B. 99. (B).

10. A tenant loses by default, where he was not summoned he may have a writ of disceit on this judgment, and a writ of error at the same time. Jenk. 69. at the end of pl. 31.

11. A writ of disceit will lie where a sheriff falsely returns a summons. Jenk. 121. pl. 45.

(B.) Upon what Recovery it lies.

[1.] IN a writ of waste, if at the grand distress the sheriff inquires of the waste by inquest, according to the statute, the defendant shall have a writ of disceit, if he was not summoned though the recovery was by inquest, because the default is the cause of the loss. 17 E. 3. 58. b.]

Fitzh. Disceit pl. 40. cites S. C. Co. Litt. 355. b S. P. F. N. B.

91. (B) S. P.

[2. But otherwise it is in an assise. 17 E. 3. 58. b.]

[3. If A. be lessee for life, the remainder in tail to B. and a præcipe in capite is brought against A. and B. as jointenants by covin between the demandant and A. and procure one to answer for B. as jointenant, and join the wife, and after they make default, by which a

final judgment is given against them; in this case B. shall have a writ of disceit, by which he shall be restored to the land. 17 E. 3. 60. b.]

F. N. B.
96. (D) S. P.

[4. In a plea of land, if the *demandant recovers by the default of the attorney of the tenant*, if the *demandant be party to this disceit*, a writ of disceit lies, and he shall recover the land. 21 E. 3. 45. b.]

5. If a man *recover an annuity*, and afterwards *sues a scire facias and recovers by default*, the *defendant* shall have a writ of disceit if he were *not warned*. F. N. B. 98. (S.)

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6. A *recovery by default against the father, in a real action*, leaves the father, and his son after his death, to their writ of right. But if the recovery was by default, and the father was *not summoned*; the father, and after his death, his heir shall avoid this judgment by a writ of disceit; by all the judges of England. Jenk. 113. pl. 20.

(C) Upon what Recovery, and in what Action it lies.

[And what shall be recovered back.]

Br. Disceit,
pl. 16. cites
S. C.

[1. If a man brings a writ of disceit against him who recovered in the first action, and the sheriff returns him summoned, upon which for the non-summmons in the first action, the recovery is reversed upon the finding of a non-summmons in the first action, the defendant in this writ of disceit shall not have a writ of disceit upon this recovery to recover the land again, if he was not summoned, but he is put to his remedy against the sheriff. 8. H. 6. 2.]

[2. If a man recovers by default in a re-summmons, where the tenant was not re-summmonsed, he shall have a writ of disceit. 13 H. 4. 8. b.]

• Fitzh.
Disceit, pl.
36 cites
S. C. where
the lands
were de-
livered by default, and the disceit found by examination by which it was awarded that the defendant re-have his lands, and the issues in the mean time; and this was in B. R.

[3. If in a *scire facias upon a recognizance* a man recovers by default, and has the lands delivered to him, a writ of disceit lies to recover the lands. 17 E. 3. 12. b. adjudged. 18 E. 3. 28. adjudged. 1 E. 3. 25. b. said to be adjudged.]

Fol. 622.

[4. If a man recovers by default in writ of waste, though he recovers in a manner by action tried, inasmuch as the sheriff inquires by jury, yet a writ of disceit lies. 29 E. 3. 42. b.]

[5. If a man recovers by default in a *scire facias to execute a fine*, though this *scire facias* be given by the statute, yet a writ of disceit lies upon it, for he was not summoned, the statute is not duly pursued. 1 E. 3. 25. b. adjudged 26.]

[6. If A. brings debt against B. upon a bill, and the defendant is in abatement, and the plea is over-ruled against the defendant, and

and the attorneys, by *disceit* between them [let judgment be entered] that the plaintiff recover his debt, whereas the judgment ought to be a *respondeas ouster*, yet no writ of *disceit* lies to reverse the record, but only to recover damages. Mich. 13 Jac. B. R. between *Waller and Dorrington*, per Curiam.]

7. Action of *disceit* lies upon recovery in writ of *waste*, and yet it is not properly recovered by default. Br. *Disceit*. pl. 39. cites 12 H. 4. 4.

8. And in *waste* *quas tenuit*, the defendant shall have action of *disceit*, and shall be restored to his treble damages lost; but to no land. For he does not lose any land. Ibid.

(D) At what Time it lies.

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[1. HE against whom the recovery is may have a writ of *disceit* before execution made. 18 E. 3. 26. 17 Ass. 14. 41 Ass. Attaint 27. per Finchden.]

(E). Who shall have the Writ.

[1. HE that loses the land shall have the writ without doubt. Br. *Disceit*. pl. 16. cites 8 H. 6. 2.] S. C. per

Rolf.—Fitzh. *Disceit*, pl. 9 cites 8 H. 6. 1. S. C.

[2. So the heir of him that loses shall have the writ. 8 H. Br. *Disceit*. pl. 16. cites 6. 2.] S. C. per

Rolf.—Fitzh. *Disceit*, pl. 9. cites 8 H. 6. 1. S. C.—S. P. per Cur. Noy 53. Griffin v. Sheet, cites S. C. & F. N. B. 97. (C).—If a man lose land, by default in a *præcipe quod reddat*, and dies his heir shall have a writ of *disceit* as well as the father, and shall have restitution. F. N. B. 98. (Q).

3. Note per Belk. that the *vouchee* who comes by the *grand cape*, ad *valentiam* need not save his default at the summons, nor shall any take advantage thereof; for no land is in demand against him in certain, and yet by *non-summons* at the writ of *summons* and *grand cape* the *vouchee* shall have writ of *disceit*, and yet the summons cannot be defeated by *ley gager* of *non-summons*, nor by any other issue; *quod nemo negavit*, &c. in action of *disceit*. Br. *Saver Default*, pl. 42. cites 50 E. 3. 17. * F. N. B. 99. (A) S. P.

4. If in *præcipe quod reddat* against baron and feme, the feme is received for default of the baron and *vouchees*, and the *vouchee* enters and dies, and re-summons is sued against the feme, and she is not re-summoned, the feme shall have action of *disceit*, and the same law where one is returned summoned upon *scire facias*; and it not warned. Br. *Disceit*, pl. 13. cites 6 H. 5. 4. Per Marten and Colkain.

5 If a man have execution by default upon a recognizance in a scire facias sued against another, and the defendant dies, his executors shall have a writ of disceit, and shall be restored, &c. If the disceit be found that their testator was not warned, there the garnishers shall be examined, &c. F. N. B. 98. (R.)

6. If the tenant for life loses by default where he was not summoned, and dies, he in the reversion shall have a writ of disceit, because he shall not have a writ of error, if not by the statute, &c. So 8 E. 3. 6. per Parnung, clearly. F. N. B. 99. (E.)

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(F.) Against Whom.

S. P. Br. [1. THE writ lies against him that recovers without doubt.
Disceit, pl. 8 H. 6. 2.]
16. cites 8.
H. 6. 1. Per Rolf.—Fitzh. Disceit, pl. 9. cites 8 H. 6. 1. 3. C.

S. P. Br. [2. So it lies against the heir of him that recovers. 8 H. 6. 2.]
Disceit, pl. 16. cites 8 H. 6. 1. Or against a stranger; per Rolf, which Newton and others denied.—Fitzh.
Disceit, pl. 9. cites 5. C.—It lies against the demandant's heir, if the summoners, vejjors and peijors are living. F. N. B. 97. (C.)

3. If one answers for another as attorney without any warrant, the defendant may move this pending the plea; but if judgment be given he is put to his writ of disceit against the attorney, and he shall recover damages; and if the defendant (plaintiff) was party to the disceit he shall have the writ against both, and recover F. N. B. 95. (E) in the new notes there (2) cites 21 E. 3. 45. by Thirning.

4. Note, that where the king recovers in quare impedit by default in his own right, or in another's right, where the party was not summoned, attached or distrained, yet he shall not have writ in B. R. to make the summoners, mainpernors, and pledges come to be examined, and the reason seems to be inasmuch as action of disceit ought to be against the party, and no action lies against the king. Br. Disceit, pl. 32. cites 10 H. 4.

5. If essoiner casts essoin, and does not warrant it at the day, disceit lies against him by the demandant who is delayed. Br. Disceit, pl. 40. cites 12 H. 4. 24.

6. And it lies against the master of the essoiner also, and the essoiner shall be in proper person. Ibid.

7. It was said that writ of disceit lies against the sheriff to recover damages; quere of this matter, for the justices were in diverse opinions. Br. Disceit, pl. 26. cites 6 E. 4. 3.

8. If a guardian pleads an ill plea where he might have pleaded a good one, by which the infant loses, the infant shall have writ of disceit at his full age; and recover all in damages against the guardian. Br. Droit de recto, pl. 15. cites 9. E. 4. 36.

9. Brian, Chocke and Pigot were in diverse opinions whether writ

writ of disceit lies against the heir of him who recovered by default, and dies, or not. Br. Disceit, pl. 30. cites 18 E. 4. 11.

10. If an action of trespass be brought against many, and the plaintiff and one J. by connivance between them cause certain persons to come into court and say, that they are the same defendants, and that they make the said J. their attorney, and afterwards the said J. as attorney for the defendants pleads unto issue, and afterwards suffers the inquest to pass by default, by which the plaintiff doth recover against the defendants; now those who are the true defendants shall have writ of disceit against J. who appeared as attorney for them, &c. F. N. B. 96. (E.)

11. If a man sues a *præcipe quod reddat* against divers tenants, and they purchase a protection for one of them, surmising that he is beyond the seas upon the king's service, whereas he is and always has been remaining in England, by which the demandant is delayed, the demandant shall have a writ of disceit against the tenants for that delay. F. N. B. 97. (B.) [495]

12. If the demandant in *præcipe quod reddat*, who recovered by false return of the sheriff, makes a feoffment of the land, then the writ of disceit lies against the demandant who recovered and his feoffee and the sheriff, and if the demandant be dead, and the sheriff also, yet the writ lies against the demandant's heir, and against him who is tenant of the land, if any of the summoners, veiors and perners are living, for if they say that they did not summon him, then the plaintiff in the writ of disceit shall recover his land and be restored, &c. But if they are all dead, then the writ of disceit is lost. F. N. B. 97. (C.)

13. If an action of debt be brought against two as executors where one of them is not executor, if he who is not executor confesses the action, he who is executor shall have a writ of disceit against him, and recover as much in damages. F. N. B. 98. (H.)

(G) Examination.

[1. F. N. a writ of disceit, if the first summoners come, and none of the other veiors or perners, and the summoners are examined, and it is found by them that the summons was not made, the judgment shall be reversed. 29 E. 3. 34.]

2. Disceit against one as tenant and another as sheriff, upon a recovery by default and scire facias against the summoners, veiors, and perners, returnable immediately, and the sheriff returned the writ served against the tenant, who appeared; and as to the sheriff, the now sheriff returned nihil, &c. and the sheriff returned, that three of the summoners were dead, and that the fourth was warned who appeared and one of the veiors was warned who appeared, and that the others were dead, and the plaintiff prayed that the summoners and veiors should be examined, and upon good argument they were examined de bene esse, for if all the summoners and veiors were dead, the action of

disceit is gone; and though it may be that two of the one sort and two of the other served the writ, yet those who appeared die, the serving shall be intended that it was done by all as the return purports, and issue false either in part or in toto by the best opinion, by which the defendant said that the summons and view was by others of the same name of those who appeared, and not by them, for those two who appeared said upon their examination, that they knew nothing of the summons nor of the pernaney in the hands of the king upon the grand cape, quod nota, and process was made against the old sheriff, who was returned nihil. Br. Disceit, pl. 7. cites 35 H. 6. 46.

3. Disceit by process against him who first recovered, and against the summoners and veiors, and the defendant by one of the summoners appeared; and the defendant pleaded a release of the plaintiff made to him, and the plaintiff prayed that the summoner should be examined; and by some justices they shall not be examined, for the plea is peremptory, for both parties. Br. Disceit, pl. 26, cites 6 E. 4. 3.

4. But upon plea to the writ or aid prayed of the king, &c. which are not peremptory, they shall be examined for danger of death, Ibid.

5. In a writ of disceit the sheriff returned, that he had warned one of the summoners but that the other was not found in his county, and likewise that he had warned the defendant; at the day of the return one of the summoners appeared, but the defendant made default, whereupon the justices examined the said summoner, who said he did not make any summons: whereupon they reversed the judgment. Bendl. 67. pl. 113. 4 & 5 P. & M. Squirry v. Read.

6. In a writ of disceit, if the sheriff returns one summoner dead, yet the other summoner shall be examined, &c. F. N. B. 98. (D).

7. Where a man loses by default in a quare impedit or waste, it behoves that the summoners and the pledges upon the attachment and the manucaptures upon the distress shall be examined, when the writ of disceit is brought therefore. F. N. B. 99. (C).

(H). [Examination.]

At what Time, [and Proceedings thereupon.]

[1.] In a writ of disceit, if one of summoners comes at the day he shall be examined presently for the danger of death, and what he says shall be entered, and process shall be awarded against the others. 26 E. 3. 61.]

[2. If a writ be sued against the party that recovers and the sheriff, and they are returned nihil, but the garnishers are returned summoned, and appear at the day, they shall be examined immediately though

though the party be absent, for danger of their death, by which the plaintiff shall be without remedy. 1 E. 3. 26. adjudged. 2 E. 3. 48. b. adjudged.]

[3. But though it be found that there was not any summons, yet it shall not be reversed presently, but a distress shall issue against the party, because he may at the return thereof plead a release. 2 E. 3. 48. b.]

4. If all the summoners and veiors are dead the action of disceit is gone. Br. Disceit, pl. 7. cites 35 H. 6. 46.

5. Disceit upon a recovery by default in formedon; the sheriff returned two summoners, W. P. and O. S. and the defendant said that there are two W. P's and O. S's in the same vill, viz. elder and younger, and the eldest appeared, and the summons was made by the youngest, and yet the court examined him who appeared for doubt of death, and he said he knew nothing of the summons. Br. Disceit, pl. 25 cites 5 E. 4. 40.

6. Disceit by four against him who recovered by default where they were not summoned; three appeared, and the summoners also, and the fourth not; and per Cur. the summoners shall be examined de bene esse for fear of death before the summoners ad sequendum simul shall be awarded. Br. Disceit, pl. 27 cites 8 E. 4. 8.

7. So upon protection cast, or if the release of the plaintiff be pleaded of all actions, or of the right. Ibid.

8. So if the defendant says that the summoner who appeared is another person of the same name. Ibid.

9. A judgment being had against S. in a cessavit, the tenant before execution brought a writ of disceit, and because that would not stay execution, he brought also a writ of error; and though both these writs tended to avoid the judgment, yet because they were upon several reasons and respects, they were both allowed. Hob, 218. pl. 283. Hill. 15 Jac. Howard v. Salkeld.

Cro. J. 547.
pl. 7. Mich.
17 Jac.
B. R. Salkeld v.
Howard
S. C. Curia
advifare

vult, and afterwards the parties compounded.——2 Roll. Rep. 127. S. C. the writ of error was discontinued by consent.——Palpi. 56, The Earl of Northumberland v. Salthill and Howard, S. C. and judgment affirmed.

(H. 2) Proceedings and Pleadings,

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1. IF a husband and wife lose the land of the wife by default, they may sue a writ of disceit, and if the husband dies, it seems the wife may sue a writ of disceit to be restored to her land, &c. or have a cui in vita upon the statute at her election; and the writ of disceit shall be directed unto the same sheriff who did the disceit and false return, and not unto the coroners, as appears, Trin. 20 E. 3. yet it seems it is not error, if it be directed unto the coroners, &c. F. N. B. 98. (C) cites 20 E. 3. Disceit 4.

2. The nature of a writ of disceit is not to recover the land by default, and it may be that the tenant who made default has a release

of the plaintiff to plead, therefore it is good to award *scire facias* against him per Marten; but per Babb. this is not the process in this writ, but *venire facias*, which is returned served against him, the which is in this action in nature of a *scire facias* in another case; per Rolfe, *he who loses by default, or his heir, shall have a writ of disceit against the recoverer or his heir, or against a stranger if he has aliened*, which Newton denied and others likewise. Per Strange. If the tenant was not warned they shall not have writ of disceit, against the sheriff to re-have the land, but *action upon the case*, for he did not lose the land here by default, but upon examination of the summoners, veitors and penvors, which is the natural trial in this action. Br. Disceit pl. 16. cites 8 H. 6. 1.

3. Disceit in *præcipe quod reddat*, the tenant was *essoined*, and after made default, and lost the land upon the grand case, and brought writ of disceit, and it was found by examination that the tenant was not summoned in the *præcipe*, and the tenant demanded judgment of the writ because the tenant in the *præcipe* was *essoined*, of which the plaintiff ought to make mention in this action, and that the *essoin* was not cast by him; for if the *essoin* was cast by him, he shall not have action of disceit, & non allocatur, for if it shall be so, he may allege it for plea, by which the defendant was awarded to answer, *quod nota*. Br. Disceit pl. 19. cites 36 H. 6. 23.

4. Disceit upon a recovery by default in formedon, the defendant shall not have the averment that those who appeared by the return of the sheriff are other persons of the same name, for then when others appear, they may say also, that the other is not the summoner, but another person of the same name, and so in infinitum, which would be a great inconvenience. Br. Disceit pl. 25. cites 5 E. 4. 40.

5. It is a good plea in writ of disceit, that he who recovered *infeoffed* him; per Catesby, *quod non fuit negatum*. 18 E. 4. 9. 2.

6. If a man recovers in a *quare impedit* by default, &c. if the defendant be not summoned, he shall have this writ, and the summoners and pledges upon attachment shall be examined thereupon. And if the disceit be found, he shall have writ unto the bishop, &c. for him. F. N. B. 98. (G).

2 Le. 193.
pl. 402.
Hill. 27
Fitz. B. R.
Williams
v. Blower
S. P. adjor-

natur. — D. 353. b. 354. a. b. pl. 30, 31. S. C. adjudged but reversed on error, but not for any matter of law. — Yelv. 72. S. C. adjudged in C. B.

[498] 7. If an attorney be not truly informed by his client to plead in any action, and he pleads, *quod ipse non est veraciter informatus, & ideo nullum responsum*, &c. the same shall be entered to save him of damages in a writ of disceit brought against him by his master, &c. F. N. B. 98. (I).

8. A. recovers against B. in a *præcipe quod reddat* by default the writ of disceit in this case is judicial and issues out of the Common-Pleas, and the process is attachment and distress infinite, and is mentioned in the writ; and in this case A. and the sheriff and the summoners and veitors are made parties by this writ, that is, he who was sheriff and made the return of the summons which by the writ of disceit

disceit is alleged to be false. If the present sheriff did this disceit, the writ of disceit aforesaid shall be directed to the coroners. Jenk. 122. pl. 46.

9. Writ of disceit by the King and Queen upon a *fine levied* by C. to D. of lands in ancient demesne, who rendered to C. for life, remainder to K. D. died pending the writ. Resolved, the writ shall not abate, because it is in nature of a trespass, which doth not demand the land, but is to punish the disceit. Mo. 13. pl. 49. Hill. 4 & 5 P. & M. the Queen v. Dewe.

Bendl. 57. pl. 94. S. C. according-ly. — 3 Le. 3. pl. 8. S. C. no land is to be recovered

but only the fine is to be reversed. — 4 Le. 197. pl. 312. S. C. in totidem verbis.

10. In a writ of disceit, upon recovery in dower for default of summons it was resolved by the court clearly, although that the words of the writ of disceit are Interim terram illam in manus nostras capias, ita quod neuter eorum manum apponat, &c. yet the sheriff cannot remove the party out of possession, but he ought only to make a general seizure; and cites Bracton 365, b. 'That the summoners, that appear to be examined, shall not have any charges by the course of the court. But the plaintiff at his peril ought to procure them, and to bear their charges.' Noy. 152. Atkins v. Gage.

(I). Judgment, and at what Time it shall be given.

[1.] IN disceit against the party that recovers, &c. if the party be returned summoned, and makes default, yet if upon examination it appears there was not a good summons, judgment shall be given presently without awarding more protests against the party that makes default, because if judgment shall be staid till he comes, there may be a distress infinite; and so the plaintiff shall be disinherited. 8 H. 6. 1. b. 5. b. adjudged.]

S. P. Br. Disceit, pl. 16. cites 8. H. 6. 1. — Fitzh. Disceit pl. 9. cites S. C. — Br. Peremptory, pl. 52. cites

S. C. and says the reason seems to be inasmuch as the party ought to have sued resummons in this case; but adds a quere, for he says it is not adjudged in that point.

2. In disceit the first summoners came, and the summoners and veiors in the grand cape, but the tenant who recovered came not, and the court not perceiving it examined the summoners and the pernours in the grand cape, and found by examination that he had not made summons by the first writ nor in the grand cape, nor the land taken into the hands of the king, by which it was awarded that he who lost should re-have his land which he lost, and he who recovered and the sheriff should be taken, without saying any thing of the issues, and when the court perceived the default of the tenant, they said that they would stay till he comes, and made process against him, for it may be that he has a release from the party, and by 8th [Edw. 3.] after the examination, and the disceit thereupon found process shall be by distress ad audiendum judicium, and not ad respondendum, whereas the process before the examination is distress infinite. Burgh, the process

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process is returned served as well against the tenant as against the sheriff, by which he prayed judgment, and Fulthorp awarded ut supra, that the plaintiff recover his land lost by the first writ, and the others were taken. Br. Disceit, pl. 12. cites 50 E. 3. 18.

3. Note, that the statute of *Westminster* 1. cap. 30. is, that if a *pleader or other make disceit to the court*, he shall have imprisonment by a year, and this is understood as well of apprentices and serjeants as of others; per Jenny. Br. Disceit pl. 28. cites 11 E. 4. 3.

(K) [Judgment] How. For the Land.

S. P. Br. Disceit, pl. 11. cites 50 E. 3. 16. — 3. 28.] [1. THE judgment shall be, That the plaintiff shall be restored to the land again. 8 H. 6. 5. b. * 17 E. 3. 12. b. 18 E.

Ibid. pl. cites 50 E. 3. 18. accordingly.

* Fitzh. Disceit, pl. 36. cites 17 E. 3. 12. S. C. & S. R. — S. P. Br. Disceit, pl. 16. cites 8 H. 6. 1.

2. If a man recovers in a writ of waste where the tenant was not summoned, &c. the defendant shall have a writ of disceit, and shall be restored. F. N. B. 98. (B.) cites T. 9 E. 3. See 17 E. 3. 58. 29 E. 3. 42, 29 E. 2. Disceit 63. and 56.

Contra per Juine. He shall recover only damages, and for that it shall be tried by the enquest.

Ibid. in the

new notes there (a) cites 1 H. 6. 5.

3. In a *scire facias* to execute a fine, if the sheriff returns the tenant summoned by two summoners, if it be not true, yet the tenant by the return shall lose the land; for execution shall be awarded upon the return if the tenant do not appear, and then the tenant shall have a writ of disceit against the sheriff, and him who had execution, and him who is tenant, and shall be restored to the land, F. N. B. 97. (D.)

4. So if a man sues a *scire facias* upon a recognizance of debt, and the sheriff returns the defendant summoned where he is not summoned, for which the plaintiff has execution awarded, the defendant shall have a writ of disceit against him who had execution, and the sheriff shall be punished by this writ for his falsity, and the party who recovered shall make restitution of that he recovered, &c. F. N. B. 97. (D.)

5. In a writ of disceit, if the sheriff returns one summoner dead, yet the other summoner shall be examined, &c. and if it be found that he did not summon, &c. the party shall be restored unto the land. F. N. B. 98. (D.)

6. And so if the viewor or perneur did not do that which he ought to do, the party shall be restored, because it ought to be done by both, &c. F. N. B. 98. (D.)

7. If a notary or other person of covin counterfeits the seal of any parson or vicar, and forges letters of resignation of his parsonage or vicarage in the name of the parson or vicar of his benefice, he shall thereupon have writ of disceit. But whether by that he shall be restored unto his benefice, quære; it seems not, because the removing of him is a spiritual act. F. N. B. 99. (K.)

(L) [Judg-

(L.) [*Judgment; How for the*] Profits.

[1. **H**E shall be restored to the issues *from the day that the defendant had execution till the day of this writ purchased.* * 41 E. 3. 21. † 17 E. 3. 12. b.]
 pending the writ the king shall have them per. Cand. But per Thorp contra. — Fitzh. Judgment, pl. 87. cites 41 E. 3. 2. [And it seems it is 41 E. 3. 2. a. pl. 4. and Roll seems misprinted.]
 — † Fitzh. Disceit, pl. 36. cites S. C.

[2. He shall also be restored to the issues *from the day of the writ purchased till the judgment*, and the king shall not have them. 43 E. 3. 32. * 17 E. 3. 12. b. 18 E. 3. 28. dubitatur. † 41 E. 3. 2. † 8 H. 6. 5. b. Contra 22 E. 3. 34.]

3. 16. contra that he could not have the mesne issues; and anno 8. Herle said that the king should have them. Quere. — Ibid. pl. 12. cites 59 E. 3. 18. Restitution was prayed of the mesne issues, quod tot. Cur. negavit, but it is said there that elsewhere he had the issues by award; therefore Quere. — Ibid. pl. 16. Some said that the party shall have them till the writ purchased, and the king pending the writ, and some e contra, cites 8 H. 6. 1.
 † Br. Disceit, pl. 8. cites S. C. — Fitzh. Judgment, pl. 87. cites S. C.
 † Fitzh. Disceit, pl. 9. cites S. C.

3. Note, per Brian, Choke and Pigot, in an action of disceit upon a recovery by default, a man shall be restored to the land and issues and profits in the mean time incurred as in writ of error or attain, and no diversity. But others contra. Br. Disceit, pl. 39, cites 18 E. 4. 11.

(M.) Judgment in what Cases; and How.

1. **I**F the one summoner denies the summons, the plaintiff shall be restored, for false in part false in all. Br. Disceit, pl. 25. cites 5 E. 4. 40. Per several of the justices.

2. And in the same case fol. 54. it was said by divers of the justices, that if it shall be proved for the plaintiff that they were not summoned, the plaintiff shall be restored to the land with the issues and profits in the mean time, and he shall have damages against the sheriff for his false return, and by some the sheriff shall only make fine to the king; for the party shall have his judgment and the mesne issues against the tenant, and the plaintiff shall be restored. Per Ibid.

For more of Disceit in general, see Actions, and other proper Titles.

* Disclaimer, or was suffered because the tenant shall not be compelled by the law to keep land against his will. Br. Disclaimer, pl. 54. cites 16 H. 7. 1.

* Disclaimer.

(A.) Of what *Things* and *Estates* a Disclaimer may be, and of what not.

Br. Disclaimer, pl. 7. cites S. C. — Fitzh. Disclaimer, pl. 10. cites S. C.

[1. A Man cannot disclaim in the principal, and not in the incidents; as he that is vouched because of a reversion cannot disclaim in the reversion, saving the feignory, 40 E. 3. 27.]

2. In writ of *mesne* by the donee in tail against the heir of the donor, founded upon the tenure, and the reversion regardant to the demandant without shewing deed of the gift, the tenant disclaimed in the feignory and in the reversion, and held good. Thel. Dig. 147. lib. 11. cap. 34. f. 9. cites Pasch. 8. E. 3. 394. Quære. Contra per Finchden Trin. 40 E. 3. 27.

3. In writ of *mesne* the defendant said, that he had not fee nor feignory in the land, but a rent seek, and held good. And the demandant was received to maintain that he held of the defendant; Prist, &c. Thel. Dig. 147. Lib. 11. cap. 34. f. 10. cites Pasch. 20 E. 3. Mesne 13.

4. Disclaimer lies not of rent but of the land. Br. Disclaimer, pl. 54. cites 16 H. 7. 1. per Townsend.

5. There be divers kinds of disclaimers; that is to say a disclaimer in the tenancy, a disclaimer in the blood, and a disclaimer in the feignory, Co. Litt. 102. a.

Fol. 631.

(B) In what *Actions*.

* In writ of *mesne* the defendant may disclaim in his feignory against the plaintiff, per Finch. But Quære; for non respondentur. Br. Disclaimer, pl. 9. cites S. C.

[1. A Man cannot disclaim in a writ of *mesne*. Quære, * 44. E. 3. 2. b. Temp. E. 1. 65. b. William Affordeby's case adjudged; and by this the *mesne* is forejudged of his mesnalty,]

In writ of *mesne*, the plaintiff bound the defendant to the acquittal by tenure of him in frankalmoign, there the defendant shall not disclaim in his feignory; for the tenant nor any other can hold but of his donor. Br. Disclaimer, pl. 35. cites 14 H. 3. and Fitzh. Mesne, 7. — In writ of *mesne*, the defendant may say, that the demandant does not hold of him, and so disclaim in the feignory, but the demandant may aver the contrary, and note, that this plea is to the action. Thel. Dig. 147. Lib. 11. cap. 34. f. 5. cites Hill. 3. E. 2. Hill. 5 E. 2. Mesne 46. 64. and in divers other books. Hill. 14 E. 3. Mesne. 7. Pasch. 28 E. 3. 93. Hill. 44 E. 3. 2. 73 H. 7. 28. and 16 H. 7. 1.

[2. The

[2. The plaintiff in a *redcpn* may disclaim. 47 E. 3. 22.]

† [3. In a *per quæ servitia* the tenant shall not disclaim, but shall say that he did not hold of him the day of the note levied. * 11 H. 4. 72. b.]

Hill. And it shall be tried per pais. — Ibid. pl. 26. cites 5 E. 4. 2. that defendant cannot disclaim; because the plaintiff shall not recover the land if he be found against him; for he demands nothing but attornment. — Fitzh. Disclaimer, pl. 8. cites 11 H. 4. 72. — Br. Per quæ servitia, pl. 3. cites S. C. & S. P. by Hill.

In *per quæ servitia* the tenant disclaimed to hold of the plaintiff, and that he did not hold of the donor the day of the writ purchased, &c. Upon which the tenant went fine die, notwithstanding that the plaintiff tendered to aver, that if, &c. Thel. Dig. 147. lib. 11. cap. 34. f. 4. cites Hill. 33 E. 1. Disclaimer 31. — Ibid. cites Mich. 12 E. 3. 13. 11 H. 4. 72. and 5 E. 4. 2. accordant.

4. In *assise of rent by the lord against his tenant the tenant disclaimed to hold of him*, and was ousted by award. Quod Nota. Br. Disclaimer, pl. 32. cites 8 E. 1. and Fitzh. Ass. 416.

man may disclaim in assise of rent. — Thel. Dig. 147. lib. 11. cap. 34. f. 6. S. P. but cites 8 E. 2. [instead of E. 1.] and cites the other cases as in Brook.

5. In *cessavit* the tenant cannot disclaim, but he shall plead well that he does not hold of the demandant. Thel. Dig. 147. lib. 11. cap. 34. f. 3. cites tempore E. 1. Disclaimer 29. and 5 E. 3. 201. agreeing. Contra it is held Mich. 16 H. 7. 1.

6. A man cannot disclaim in * *nuper obiit, assise, writ of dower*, nor in any action where the demand is not comprised in the writ. Br. Disclaimer pl. 49. cites it. Canc. 6 E. 2.

in the blood. Ibid. pl. 52. cites 11 H. 7. 14 per Wood and Davers.

7. Entry in the quibus against two, the one would have disclaimed, and was not suffered; for he is in *de son tort demesne*, which see in the old Nat. Brev. in the additions of the writ of right upon the disclaimer. Br. Disclaimer, pl. 36. cites 4 H. 5.

8. And see there that the * *tenant shall not disclaim in writ of cessavit*, but may say that he does not hold of the demandant. Ibid.

27. Ibid. pl. 52. cites 11 H. 7. 14. contra, that he may disclaim in *cessavit*; per Wood and Davers. — S. P. agreed by all except Vavisor; Ibid. pl. 54. cites 16 H. 7. 1.

9. In action in which a man may recover damages, and the tenant disclaims, the demandant may aver him tenant. Br. Disclaimer, pl. 17. cites 36 H. 6. 28. per Danby.

10. Contra where he cannot recover damages; for he is at no mischief; for he may enter. Ibid.

damages are to be recovered, the demandant may aver his writ, and oust him of the disclaimer in satisfaction of his damages; agreed per omnes. Br. Disclaimer, pl. 54. cites 16 H. 7. 1.

11. In *formedon in remainder* it was said that in action against two, the one alone may disclaim, as well as one may in action against one alone, and the demandant shall not put him to his disclaimer, unless in action in which it is to recover damages; Quod Nota. Br. Disclaimer, pl. 22. cites 5 E. 4. 46.

12. Fortescue made *avowry in replevin*, and after he perceived that the plaintiff would have disclaimed, by which he relinquished the *avowry*, and made justification, and then the plaintiff cannot disclaim.

Br. Disclaimer, pl. 12. cites S. C. per

Ibid. pl. 54. cites 13 H. 7. 27. contra, that a

* A man may disclaim in *nuper obiit*

* S. P. Ibid. pl. 54. cites 17 H. 7.

In all actions in which a man shall not recover damages a man may disclaim, but where

In formedon the tenant may disclaim. Ibid. pl. 54. cites 16 H. 7. 1.

S. P. Ibid. pl. 14. cites 15 E. 4. 29. — In re-

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plevin, the plaintiff has election to plead bar or disclaimer.

claim. Note the diversity, that a man cannot disclaim in justification; contra in avowry; and upon justification the defendant shall not have return. Br. Disclaimer, pl. 15. cites 9 E. 4. 28.

Br. Disclaimer, pl. 43. cites 21 H. 7. 20.

13. In writ of entry in nature of assise of rent. The tenant pleaded a bar at large as to a rent charge, and the demandant made title to a rent service issuing out of land, which the tenant held of him, and the tenant disclaimed to hold of him, and thereupon it was demurred in law. Thel.-Dig. 148. lib. 11. cap. 34. f. 18. cites 11 H.

7. 14. 13 H. 7. 27. and 16 H. 7. 1.

14. In cui in vita a man may disclaim. Br. Disclaimer, pl. 54. cites 16 H. 7. 1.

S. P. per Kehle

Ibid. pl. 54. cites 13 H. 7. 27.

15. A man may disclaim in writ of customs and services. Br. Disclaimer, pl. 45.

16. Br. conscience pl. 18. makes a quære, whether a man may disclaim in Chancery.

17. Lessee for years is plaintiff in replevin, the defendant avows upon A. a stranger as his tenant, who comes and says, that he is A. the tenant, and that the plaintiff is his lessee for years; resolved by all the justices of England, that A. may join in aid gratis without process, and that both may disclaim, and that the plaintiff shall recover his damages, and the defendant shall be in misericordia. In the case of tenant at will, where there is a joinder in aid to him in replevin, no disclaimer lies for him in this case; for he loses nothing. Jenk. 56. pl. 3.

18. Lord, mesne, and tenant in replevin, the mesne cannot disclaim; for a writ of right upon a disclaimer demands the land and he has it not; and the lord has no benefit by this disclaimer; for the tenant cannot lose his tenancy by the disclaimer of the mesne and the lord has not more nor better, or other services than before the disclaimer. A writ of right of disclaimer lies, where both mesne and tenant disclaim; if the disclaimer be in a court of record, a writ of right lies upon the disclaimer. Jenk. 142. pl. 95.

19. A grants an annuity to B. pro consilio impendendo. Upon a writ of annuity against A. A. may disclaim to have counsel, and so extinguish the annuity; but it is otherwise if the annuity was granted pro consilio impenso & impendendo. Jenk. 236. pl. 14.

20. 21 Jac. 1. cap. 16. s. 5. In all actions of trespass quare clausum fregit, wherein the defendant shall disclaim any title to the land, and the trespass be by negligence or involuntary, the defendant shall be admitted to plead a disclaimer, and that the trespass was by negligence or involuntary, and a tender of sufficient amends before the action brought; and if the issue be found for the defendant, or the plaintiff be nonsuited, the plaintiff shall be barred from the said action, and all other suits concerning the same.

This extends only to actions of trespass; but as to replevin, that remains at common law. Adjudged. 2 Lutw. 1596. 9 W. 3. Allen v. Bailly.

(C) What Persons may.

[1. *SUCH* person as cannot lose the thing perpetually in which he disclaims, shall not be suffered to disclaim.]

[2. *As an abbot cannot disclaim.* 40 E. 3. 27. b. 20 H. 6. 46. Br. Disclaimer, pl. 7. cites S. C. Curia.]

—S. P. Br. Disclaimer pl. 17. cites 36 H. 6. 28. —S. P. ibid. pl. 27. cites 10 E. 4. 2. —*Affise of 10 l. by a prior against an abbot, the abbot came and said, that his predecessor without assent of the convent purchased the land of the prior, and covenant rendering the 10 l. rent, where the land was not worth the moiety of the rent, by which his predecessor, next before him, waived the land, and this abbot descended after him also, and so disclaimed, and so see that he who has fee, as here, may waive his land; and he said also in court that he relinquished and renounced the land to the plaintiff, and so the franktenement by him shall be adjudged in the plaintiff and demanded judgment, if this writ against him shall go, and shewed deed of the prior and convent, sealed to his predecessor, and the deed and seal of the abbot only without the convent made to the predecessor of the prior; and upon this the assise was awarded.* Br. Disclaimer, pl. 19. cites 43 Ass. 23. —Thel. Dig. 147. lib. 11. cap. 34. § 13. cites S. C. —Abbot shall not disclaim. Ibid. 148. f. 20. cites 36 H. 6. 36. per Prisot.

[3. *A bishop cannot disclaim, for he cannot devise the right out of the church.* 40 E. 3. 27. b.] *In præcipe quod reddat the tenant*

vouched to warranty the bishop of R. because his predecessor with the assent of the chapter gave in tail to his ancestor saving the reversion, and the bishop disclaimed in the reversion having to him the ancient services; and per Wiche. he cannot disclaim; for these services shall be intended the services which come by reason of the reversion; and also by this disclaimer nothing can be vested in the demandant, and also he cannot prejudice his successor, to which Mowbray agreed; wherefore the bishop passed over. Br. Disclaimer, pl. 7. cites 40 E. 3. 27.

[4. *Baron and feme may disclaim for the feme.* 3 H. 6. 29.] Br. Disclaimer, pl.

44. cites S. C. —*Præcipe quod reddat against baron and feme, the baron cannot disclaim for his feme, nor the feme for the baron, which was in a manner agreed; for nothing can be vested out of the one into the other by such disclaimer between them; for they are one and the same person in the law.* Br. Disclaimer, pl. 38. cites 14 H. 4. 18. —*Contra between other persons.* Ibid. —S. P. per Skreene and Norton. Ibid. pl. 46. cites S. C. —In writ against baron and feme, they disclaimed for the feme, and the baron pleaded over, and after made default, and at the petit cape the feme was received and vouched notwithstanding this disclaimer. Thel. Dig. 147. lib. 11. cap. 34. f. 12. cites Mich. 16 E. 3. Resceit 102. and 22 Ass. 11. agreeing. But says it is held Hill. 32 E. 3. Disclaimer 25. that the baron cannot disclaim for his feme in præcipe quod reddat, and if the disclaimer he admitted that she shall not be received afterwards upon default of her baron, and against such disclaimer the demandant shall maintain his writ, and cites 32 E. 3. Maintenance de br. 54. 36 H. 6. 36. agreeing, and 41 E. 3. Disclaimer 11. Quære. And such disclaimer was admitted, Pasch. 32 E. 2. Voucher 102. 14 H. 4. 18. And the baron and feme were received to disclaim for them two, Hill. 34 E. 3. Voucher 315. and 31 E. 2. Droit 72. in Customs and Services.

[5. [*Bar*] if the baron hath nothing but in the right of his feme, S. P. Br. he cannot disclaim. Contra, * 9 H. 6. 52.] Disclaimer

pl. 17. cites 36 H. 6. 34. per Prisot. —Br. Baron and feme, pl. 79. cites S. C. per Martin that the wife has no remedy. —Thel. 148. lib. 11. cap. 34. cites 36 H. 6. 36. S. P. by Prisot.

[6. *In an avowry baron and feme cannot disclaim, for if they have matter of disclaimer, they ought to plead it.* 22 E. 3. 5. b.] Fitzh. Disclaimer.

S. C. —*Avowry upon baron and feme in jure uxoris, he and his feme disclaim, and it was held, that the disclaimer lies well notwithstanding that the feme was covert.* Br. Disclaimer pl. 6. cites 35 H. 6. 10. —But Brook says, Quod mirum. For contra 10 E. 4. 2. per Cur. Ibid. —Ibid. pl. 27. § cites 10 E. 4. 2. accordingly, that where baron and feme are plaintiffs, they cannot disclaim; for then the land of the feme shall be in jeopardy by this disclaimer. —But it is said

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said there, that in the time of E. 2. the baron had aid of his feme, and they disclaimed after conveyance. Ibid.

* S. P. Ibid. pl. 36. cites S. C. — S. P. Ibid. pl. 43. cites S. C. accordingly. But it is said elsewhere, that in *præcipe quod reddat* against the baron and feme, the baron may disclaim for his feme and take the tenancy to him alone; but if the feme be tenant and be ousted, by this the feme shall have assise. Ibid.

† S. P. and the feme is without remedy. Br. Disclaimer pl. 44. cites 9 H. 6. 52.

An infant shall not be suffered to disclaim. Br. Disclaimer, pl. 17. cites 36 H. 6. 34. per Prisot. — Thel. Dig. 141. lib. 11. cap. 34. f. 20. cites 36. per. Prisot.

[7. An *infant voucher*, because of a reversion descended to him, cannot disclaim in the reversion. 5 E. 3. 25. b.]

8. *Quo warranto* against the bishop of W. who disclaimed in the liberties; per Cur. this disclaimer shall bind him and his successors to claim it after. Br. Disclaimer, pl. 47. cites 6 E. 3.

9. *Mortdancer* against the baron and feme and J. S. and the baron disclaimed for his feme and vouched. Br. Disclaimer, pl. 50. cites 30 Ass. 10.

It was said that a *parcener* may disclaim his *companion* notwithstanding his tenancy be intire; and the lord shall have action of the moiety. Br. Disclaimer, pl. 27. cites 10 E. 4. 2.

10. In writ against two *jointenants*, if the one disclaims the whole shall vest in the other, inasmuch as this is a disagreement to the purchase of record; but it is not so in writ against *parceners*, where the one disclaims, nor where they are jointenants by fine; per Shard. Quære. Thel. Dig. 147. lib. 11. cap. 34. S. cites Hill. 35 E. 3. Disclaimer 23.

11. *Entre sur disseisin* against the baron and feme and their son; the son disclaimed, and the baron disclaimed for his feme, and pleaded villenage for himself. Br. Disclaimer, pl. 8. cites 43 E. 3. 5.

12. Note, it is said per Ascough J. that where an abbot in person or by bailiff avows or makes consuance, the plaintiff cannot disclaim by reason of the mortmain; Quod non contradicitur. Br. Disclaimer; pl. cites 28 H. 6. 10.

13. *Pernor of the profits* shall not disclaim, for none shall disclaim in prejudice of another, and this is in prejudice of *feoffees* that the pernor of the profits, who is *cestuy que use*, disclaims. Br. Disclaimer, pl. 17. cites 36 H. 6. 34. per Prisot.

14. *Trespas* of a house broken, assault and battery, and goods taken, the defendant said, that the plaintiff, at the time of the taking, held the house by fealty and 10 s. rent, of which services he was seized, &c. and for so much of rent arrear such a day he at the time of the trespass &c. found the house open and took the goods as distress, and the plaintiff would have retaken them, and the defendant put his hands peaceably upon him and said, that if he took them he would have writ of rescous, which is the same assault, battery, breaking of house, and taking of goods, of which the plaintiff brings his writ, &c. and the plaintiff said that he did not hold the house of him priest, and the others contra, and a good issue per Cur; for in replevin and rescous hors de son fee is a good plea, contra in trespass, for here he cannot disclaim or answer to the fee; for the defendant does not suppose that he has fee there but that he holds of him, and therefore that he does hold of

of him is a good plea, quod nota. Br. Issues joins, pl. 26. cites 38 H. 6. 26.

15. *Bailiff* shall not disclaim in land, contra of attorney. Br. Baillie, pl. 29. cites 9 H. 7. 24. Per tot. Cur.

* 16. If the *tenant in frankalmoign brings writ of mesne* against his lord, the *lord cannot disclaim in the seignory*, because he cannot hold of any man in frankalmoign, but of his donor and his heirs. And so note, a *diversity between a tenure in frankalmoign*, whereby divine service is maintained, and *homage ancestrel*, which respects temporal service; but if the lord will not disclaim in the seignory in case of homage ancestrel, then albeit he has received homage he shall warrant the land. Co. Litt. 102. a.

17. An *abbot, prior, bishop, archdeacon, prebend, parson, vicar, or any other sole corporation* that is *seised in auter droit* cannot disclaim, because, as Littleton says, they alone cannot devest any fee which is vested in their house or church; for the wisdom of the law would never trust one sole person with the disposition of the inheritance of his house or church; but an abbot and prior and their convent, the bishop his chapter, the parson and vicar their patron and ordinary [may,] and the like of sole corporations, without whose assent they could pass away no inheritance. Co. Litt. 103. a.

(D) Who in Respect of their Estates may Disclaim.

[1. I F *lessee for years brings a replevin*, and an *avowry is made upon the lessor, who joins to the lessee*, they both may disclaim. 45 E. 3. 8.]

The disclaimer and the joinder therein is good. For the termor by his disclaimer shall lose his term, as the lessor tenant of the frank tenement shall his frank tenement; but the tenant at will and the lessor shall not join in disclaimer; for the tenant at will cannot put any thing in jeopardy. Br. Disclaimer, pl. 16. cites S. C. — Term or for years and be in reversion may disclaim. Br. Disclaimer, pl. 36. cites 4 H. 5.

[2. So if the *mesne* joins to the tenant they may disclaim. 45 E.

[3] 7. b.]

Br. Disclaimer, pl. 10. cites

S. C. but not S. P.

[3. In an *avowry upon lessee for life for rent*, he cannot disclaim for the prejudice of him in reversion. 20 H. 6. 46. 28 E. 3. 96. For the lord cannot have a writ of right upon the disclaimer of such lessee; ergo.]

[4. He in reversion being vouched by tenant in dower, cannot disclaim in the reversion. 50 E. 3. 25. b. against his own lease. 20 H. 6. 24. 17 E. 3. 39. b.]

[5. But the heir may disclaim, being vouched upon a lease made by his ancestor. 20 H. 6. 24. 18 E. 3. 42. b. adjudged. 38 E. 3. 32. b.]

[6. So if a man be vouched because of a reversion purchased by fine, VOL. VIII. Q 9 he

he may disclaim against the fine. 20 H. 6. 24. Contra, 17 E. 3. 39. b. Curia.]

[7. A disseisor may disclaim. 45 E. 3. 8.]

[8. If a man be vouched because of a reversion upon a lease made by himself, he cannot disclaim. 17 E. 3. 39. b. Curia.]

9. If a man be vouched for homage taken by his ancestors, he may disclaim. Contra if he be vouched for homage taken by himself. Br. Disclaimer, pl. 35. cites 47 H. 3. and Fitzh. Voucher 270.

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10. *Præcipe quod reddat* was brought against two, where the one of them had leased to the other for eight years upon condition that if he did not pay 10l. within one year, that then the lessee shall have fee; and the feoffor durst not disclaim in the land for fear of losing the advantage of the condition in futurum. Br. Disclaimer, pl. 34. cites 12 E. 2. and Fitzh. Voucher 265.

11. If the lord paramount distrains the tenant paravaile, and be brought replevin, and the lord avowed upon him, he cannot disclaim, because he holds of him by a mesne; agreed per Cur. Br. Disclaimer, pl. 1. cites 9 H. 6. 25.

12. But per Marten he may say that he holds of the mesne by such services, and he holds over of the defendant by such services, absque hoc, that he holds of the defendants immediately modo & forma. Ibid.

13. In replevin, the defendant as bailiff to the prior of S. made conuenance for rent and fealty, &c. upon one J. N. the plaintiff said that J. N. leased to him for three years, and prayed aid, and had it, and they joined, and day given to the next term, at which term they joined and disclaimed, to which the defendant said that mesne between the two terms, the lease and term of the plaintiff is determined; and yet because he remains party, and the joining is good, therefore the disclaimer was awarded good; quod nota. Br. Disclaimer, pl. 4. cites 28 H. 6. 12.

14. Where the tenant leases his land for years, the lord distrains, the termor brings replevin, the lord avows, the termor prays aid of the lessor, and had it; they two upon the joinder may disclaim; quod nota. Br. Disclaimer, pl. 16. cites 9 E. 4. 32.

15. In replevin, per Jenney, in avowry if the donor joins to the tenant in tail, they cannot disclaim. Br. Disclaimer, pl. 30. cites 12 E. 4. 16.

16. So it is where an abbot is mesne and joins to the tenant in avowry, &c. which Littleton and Neale agreed. Ibid.

* S. P. Ibid.
pl. 54. cites.
16 H. 7. 1.

17. And the serjeants held, that if there be lord mesne and tenant, the mesne cannot disclaim in avowry; * for he cannot lose the tenant's land; but if he joins to the tenant, they two may well disclaim; for this is the act of the tenant himself to do so. *Quære*; for the avowry is made upon the mesne, and not upon the tenant, and therefore as it seems that the lord where there is mesne shall not have writ of right upon disclaimer against the tenant by disclaimer of the tenant. Br. Disclaimer, pl. 30. cites 12 E. 4. 16.

18. In avowry it appears by the argument that if a man distrains for

For two feignories one and the same man who is tenant of both, where of the one feignory there is lord mesne and tenant, and of the other feignory is lord and tenant only, and the mesne joins to the tenant, and he and the mesne disclaims for all, they may join by the manner, and that for the one part lies one writ of right upon disclaimer, and another writ of right upon disclaimer for the other part, inasmuch as it was of two feignories, of which there was lord mesne and tenant for the one, and lord and tenant for the other, and that they may well disclaim; *quære bene*. Br. Disclaimer, pl. 42. cites 13 E. 4. 6.

19. In *quod ei de forceat*, it is said that he who was the lessee shall not disclaim; otherwise it is of his grantee. Br. Disclaimer, pl. 51. cites 10 H. 7. 10.

20. And if tenant for life prays aid of him in reversion, he shall not disclaim. Ibid.

21. *Præcipe quod reddat* of rent, the defendant pleaded in bar, and the demandant said that the defendant held the land of him, &c. by which the defendant disclaimed, and may well; per Wood and Davers; for pernor cannot disclaim; contra of tertenant; and now it appears that * he is tertenant; contra per Vavisor; for now the plea is only in abatement of the writ, which cannot be after bar pleaded. Br. Disclaimer, pl. 52. cites 11 H. 7. 14.

He who is not tertenant cannot disclaim; for he shall not lose another's land. Br. Disclaimer, pl. 54. cites 16 H. 7. 1.

22. In *replevin* the defendant avowed as lord in tail, &c. upon the tenant, there the tenant shall not be permitted to disclaim; for the lord cannot have writ of right upon disclaimer; for he has not fee-simple. Br. Disclaimer, pl. 53. cites 13 H. 7. 14.

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(E.) The Place.

[1. **T**HE disclaimer refers to the place where the avowry is made. 40 E. 3. 33.]

(F) How it may be.

[1. **I**N an avowry the plaintiff cannot disclaim by attorney, because the avowant cannot have a writ of right sur disclaimer thereof. 22 E. 3. 6. b.]

2. In a *mordancester* the tenant may disclaim for his master. 22 Ass. 25.]

Fol. 632.

It was agreed that tenant may disclaim by attorney. Br. Disclaimer, pl. 18. cites S. C. — Ibid. pl. 40. S. P. cites S. C. — Bailiff in office cannot disclaim for his master; *cum* of attorney. Br. Disclaimer, pl. 21. cites 5 E. 4. 46.

3. In writ of entry the tenant in person disclaimed only for cause of nurture, and the demandant averred him tenant, &c non allocatur,

catur, by reason that he shall disclaim in person. Contra upon disclaimer by attorney. Br. Disclaimer, pl. 48. cites It. Canc. 6 E. 2.

4. *Præcipe quod reddat against two*, the one said that the other was his villein, which the other agreed; which was taken a disclaimer, and the writ good; and the villein went quit by award. Br. Disclaimer, pl. 39. cites 21 E. 3. 14.

5. It was held by Hals in writ against two, if the one disclaims, that the other cannot disclaim also, because it cannot vest in any, but he may plead specially, and say that he never agreed to the feoffment, and if he be in by descent to say that he waived the possession. Thel. Dig. 147. lib. 11. cap. 34. f. 15. cites Hill. 4 H. 5. Disclaimer 27. Where in writ of entry in the quibus against two, the one was not received to disclaim, because he was in de son tort demesne.

6. In *formedon against two*, if the one disclaims the other cannot plead to the whole without taking the entire tenancy; for he may choose to plead to the whole or to the moiety. Thel. Dig. 148. lib. 11. cap. 34. f. 16. cites Pasch. 27 H. 6. Disclaimer 28. And that so agrees 33 H. 6. 53. Where in writ against two the one made default after default, and the other disclaimed for all, upon which the demandant recovered all against him, who made default, by judgment, notwithstanding that the grand cape did not issue but of the moiety. And note that this disclaimer was sole in the tenancy, with protestation that the demandant held the land of him who disclaimed by such service. Thel. Dig. 148. lib. 11. cap. 34. f. 16.

7. *Writ of entry of rent in nature of assise* where the demandant supposed the land to be held of him, the defendant disclaimed to hold the land of him; and per Brian, he shall not disclaim in the land; for rent is in demand and not the land. Per Townsend he disclaims in the tenure and not in the land; but in avowry he may disclaim to hold of him. Br. Disclaimer, pl. 54. cites 13 H. 7. 27.

(F. 2) Bar to Disclaimer. What is. And Pleadings.

1. *CESSAVIT* by a bishop, the tenant appeared and confessed the tenure, and tendered the arrears as the demandant counted, this is a conclusion to disclaim in another cessavit, or in writ of custom and services. Br. Disclaimer, pl. 11. cites 50 E. 3. 23.

2. In *trespass*, if a man avows and the plaintiff confesses the avowry, yet in another avowry he may disclaim; per Needham, which Moile denied, therefore *quære*. Br. Disclaimer, pl. 23. cites 2 E. 4. 16.

3. In

3. In *formedon* the tenant disclaimed, the demandant maintained his writ that the defendant was *pernor* of the profits the day of the writ, and *tenent* of the *frank-tenement* the day of the action accrued, and per Littleton,* he shall not maintain his action so; for he is not to recover damages in this action; and therefore he may enter. But Needham J. contra, and that he may so maintain his writ; for he cannot enter; for the judgment upon disclaimer is no more than that the demandant shall take nothing by his writ, which is in effect that the writ shall abate; and then the demandant cannot enter; for if he enters the tenant may have † assise; quod quære inde; for it seems the law is contra; for the disclaimer estops the tenant to have assise. Br. Disclaimer, pl. 24. cites 4 E. 4. 38.

* S. P. But per Choke J. by disclaimer of the tenant the demandant may enter into the land upon the tenant, or any who is in by him pending the writ or after; as where the tenant

aliened pending the writ, or after; but he cannot enter upon him who is not in by him. Br. Disclaimer, pl. 25. cites 5 E. 4. 1.

† Where the demandant entered by disclaimer and the tenant brought assise, the party who entered by the disclaimer cannot plead the disclaimer in bar, judgment si actio. But judgment if he shall be received to this action without shewing how he came by it after. Per Danby. Br. Disclaimer, pl. 25. cites 5 E. 4. 1.

4. In *replevin* the defendant said, that N. was seized of 20 acres of land, of which, &c. and held of him by service, &c. and alleged seisin by his hands, whose estate the bailiff had the day of the taking, and avowed upon the plaintiff, and the plaintiff disclaimed, and the defendant said, that the plaintiff was not tenant of the *frank-tenement* at the time of the disclaimer; per Littleton, this is a good plea; for the que estate made him tenant to the avowry, and not tenant of the *frank-tenement*; and in writ of right upon disclaimer brought against a stranger, he may say that he who disclaims had nothing in the land at the time of the disclaimer; for he who has not the land cannot forfeit it. Br. Disclaimer, pl. 28. cites 12 E. 4. 13.

* S. P. by the best opinion; for it may be that he has made a scoffment in fee, pending the writ. Ibid. pl. 41. cites S. C.

5. If the lord, who is vouched, has received homage of the tenant or of any of his ancestors, then he shall not disclaim, but is bound by the law to warrant the tenant; therefore it is good for the tenant, to the intent to oust the lord of his disclaimer, in his voucher to allege, that the lord has taken homage of him; and if he allege it not, and the lord offers to disclaim, the tenant may counter-plead the same by acceptance of homage; and the reason that the lord cannot disclaim in that case, is, for that he has accepted his humble and reverent acknowledgment to become his man of life, and member and terrene honour, and to be faithful and loyal to him for the tenements which he holds of him, and against the acceptance hereof the lord cannot disclaim. Co. Litt. 102. a.

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6. In quo warranto against the citizens of Canterbury who claimed divers liberties, &c. within the arch-bishop's palace; as to part in such a place they justified in the city præterquam in Staple-Gate and West-Gate, and quoad residuum locorum disclaimed; resolved that the disclaimer extends to Staple-Gate and West-Gate, notwithstanding the præterquam. 2 Roll. Rep. 482. Trin. 21 Jac. B. R.

(G) Writ thereupon.

Against whom the Writ of Right sur Disclaimer lies.

Fitzh. Dis-
claimer, pl.
12. cites
S. C.

[1.] IT is not necessary that the writ should be brought against him that disclaims, for it shall be but *only against him that is found tenant of the land*, and against no other, [and though] he be a stranger, it is not material. 45 E. 3. 7. b.]

Fitzh. Dis-
claimer, pl.
12. cites
S. C.

[2.] If the *mesne* joins to the tenant, and both disclaim, the writ shall be brought only against the tenant. 45 E. 3. 7. b.]

3. In replevin the defendant made consuance as bailiff of one A. and the plaintiff disclaimed; per Brian, writ of right upon disclaimer lies for the master upon this disclaimer against the bailiff; for there is sufficient privity between the bailiff and the lord, quod non negatur. Br. Disclaimer, pl. 16. cites 9 E. 4. 32.

4. But where the lord leases his manor for years, the tenants at-torn, and the termor distrains and avows, the tenant cannot disclaim; for the termor cannot have writ of right upon disclaimer; and if the lessor will not bring writ of right upon disclaimer, the termor of the lessor may have writ of right upon disclaimer, Ibid.

5. Lord or his mesne shall not have writ of right upon disclaimer against the tenant by disclaimer of the tenant. Br. Disclaimer, pl. 30. cites 12 E. 4. 16.

(H) Writ of Disclaimer.

For Whom it lies.

S. P. Br.
Droit de
Recto, pl.
30.

1. THE heir shall not have writ of right upon disclaimer made in the time of his father sur, &c. and so the disclaimer no estoppel but only against him who made the avowry in whom the disclaimer was, and not against his heir. Br. Disclaimer, pl. 2. cites 27 H. 6. 2.

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2. A man cannot disclaim against a termor of a seignory in replevin, viz. against tenant for years of a seignory who avows in replevin; for termor cannot have writ of right upon disclaimer. Br. Disclaimer, pl. 36. cites 29 H. 6.

3. And see M. 9 E. 4. there that a man can not disclaim against tenant in tail of a seignory; the reason seems to be inasmuch as none can have writ of right upon disclaimer but he who has fee-simple in the seignory. Ibid.

4. Note,

4. Note, the bailiff made consuſance for his maſter by tenure from him, and the tenant diſclaimed to hold of him, the lord brought right upon diſclaimer, and well though he be a ſtranger to the record of replevin; for the conſuſance was made in his right and concordat 22 E. 3. and in this action the tenant ſhall not have the view, nor ſhall he vouch; for he is the ſame perſon who did the wrong, viz. diſclaimed, quod nota, by the juſtices of C. B. Br. Disclaimer, pl. 29. cites 12 E. 4. 14.

5. In replevin, in avowry between the bailiff or ſervant of the lord and the tenant, if the tenant diſclaims to hold of the lord, the lord may have writ of right upon diſclaimer, though the lord be party to the avowry by aid-prayer or otherwiſe. Br. Disclaimer, pl. 20. cites 9 H. 7. 23. per Brian.

6. In replevin the defendant avowed as lord in tail, &c. upon the tenant, there the tenant ſhall not be permitted to diſclaim; for the lord cannot have writ of right upon diſclaimer; for he has not fee-ſimple. Br. Disclaimer, pl. 53. cites 13 H. 7. 14.

(I) The Effect of Disclaimer.

1. **D**OWER against R. and J. per Fulthorp, if R. diſclaims, this veſts the frank-tenement and right in J. But contra if he pleads nontenure; for notwithstanding this the right remains in his perſon. Br. Disclaimer, pl. 13. cites 22 H. 6. 44.

2. In avowry the defendant made avowry as heir to his father, late lord, upon the tenant, as upon his very tenant; the tenant ſaid, that at another time his father, whoſe heir the defendant is, made avowry upon him, and he diſclaimed for the ſame rent, and demanded judgment if he ſhall be received to avow upon him contrary to the diſclaimer, which is of record; and notwithstanding the avowry was held good; by which he diſclaimed again. Br. Disclaimer, pl. 2. cites 27 H. 6. 2.

3. Where tenant diſclaims againſt his lord, and after the ſame lord diſtrains him, and he makes reſcous, and the lord brings aſſiſe, the diſclaimer is no plea. Quære. Br. Disclaimer, pl. 3. cites 28 H. 6. 10.

4. And it ſeems there that writ of right upon diſclaimer lies as well where the tenant diſclaims againſt a bailiff of the lord who makes conſuſance, as where the lord himſelf had been party, and had made avowry. Br. Disclaimer, pl. 3. cites 28 H. 6. 10.

5. Præcipe quod reddat againſt two, the one made default after default, and his default recorded, and the other ſaid, that the demandant held the land in demand of him, and ſaving to him his ſeignior, (and ſhewed what) he diſclaimed to have any thing in the land; by which the demandant had judgment to recover the whole againſt him who made default; for by the diſclaimer all veſts in him who made default; quod nota; as well as if both had appeared, and the one had diſclaimed. Br. Disclaimer, pl. 5. cites 33 H. 6. 53.

6. If *tenant for life disclaims*, the *demandant enters*, and the *tenant dies*, he in *reversion may re-enter*, and therefore it is best for the *demandant* * to *aver his writ*; per Moile. Br. Disclaimer, pl. 17. cites 36 H. 6. 28.

7. Disclaimer *estops the tenant to have assise*. Br. Disclaimer, pl. 24. cites 4 E. 4. 38.

8. *Formedon in remainder, &c. Disclaimer is not dilatory but may be peremptory*; for the *demandant* by this may enter. Br. Dilatories, pl. 13. cites 5. E. 4. 46.

9. By *disclaimer in avowry the lord is out of possession of his services, and nothing remains but the right of the seignior to have writ of escheat, &c.* Br. Disclaimer, pl. 54. cites 16 H. 7. 1. Per Brian, Townshend and Keble.

10. *And assise, cessavit, and all writs of possession are gone.* Ibid.

11. By entry upon disclaimer in *formedon*, the *heir in tail is remitted*; per Townsend, quod fuit concessum. Br. Disclaimer. pl. 54. cites 16 H. 7. 1.

12. By the disclaimer in the *seignior* in a court of record the *seignior is extinct* in the land. 2dly, That after the disclaimer the *tenant shall hold of the next lord paramount* by the same services as the mesne so disclaiming held before. Litt. S. 146. and Co. Litt. 102. b.

13. If a man be disseised and a disseisor dies, his heir being in by descent, now the entry of the disseisee is taken away; and if the disseisee bring his writ of entry sur disseisin in the per against the heir, and the heir disclaims in the tenancy, &c. the demandant may aver his writ that he is tenant as the writ supposes, and thereby to recover his damages; but if he will relinquish the averment, &c. he may lawfully enter into the land because of the disclaimer, notwithstanding that his entry before was taken away; and this was adjudged before Sir R. Danby Ch. J. of C. B. and his companions, &c. Litt. S. 692.

14. In a *formedon in reverter*, if the *tenant pleads non-tenure generally*, the *demandant* may maintain his writ that he is tenant, though he can recover no damages. Adjudged by all the court, and that Litt. and Co. were not to be intended of a simple plea of non-tenure, supposing the *tenant has no freehold, but a reversion in fee*, the *demandant* shall not be restored to the fee, for *nothing is disowned by the simple plea of non-tenure but only the freehold*, which may be true, and yet he may have the reversion in fee, but when the tenant disclaims, or pleads non-tenure, and disclaims, the *demandant* shall be restored to the whole, because he has disclaimed the whole, 3 Lev. 330. Trin. 4 W. & M. Hunlock v. Peter.

(K) Judgment in Disclaimer.

1. I N writ of customs and services, if the tenant disclaims to hold of the demandant, the writ shall abate, by which action is accrued to the demandant by writ of right upon disclaimer. Thel. Dig.

Dig. 147. lib. 11. cap. 34. f. 2. cites Trin. 31 E. 1. Droit 72. & Hill. 2 E. 2. Droit 28. & 13 H. 7. 27.

2. In writ of right of *advowson*, if the tenant disclaims the demandant shall not have writ to the sheriff to deliver seisin; but in quare impedit the plaintiff shall have writ to the bishop. Thel. Dig. 148. lib. 11. cap. 34. f. 21. cites Hill. 6 E. 3. 249.

3. In *nuper obiit*, if the tenant disclaims in the blood the writ shall abate, and the demandant shall not maintain his writ; but where the tenant says that he does not claim any thing by descent of heritage but by purchase, there the demandant may maintain his writ, Thel. Dig. 147. lib. 11. cap. 34. f. 7. cites Pasch. 7 E. 3. 311. & 11 H. 7. 14.

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4. In *formedon against two*, if the one disclaims and the other pleads *non-tenure*, they may well do so, but the demandant shall not have judgment to recover thereupon, but he may well enter, &c. Thel. Dig. 148. lib. 11. cap. 34. f. 17. cites 36 H. 6. 31. 36. & 13 H. 7. 28. And that so agrees Pasch. 5 E. 4. Brief fol. 1. & Long 5 to fol. 45. For upon disclaimer in writ where a man shall not recover damages, the judgment shall be that the demandant shall take nothing by his writ, but the judges were in a contrary opinion there if the demandant might enter upon him to whom the tenant disclaiming made alienation pending the writ, quære,

5. Upon the disclaimer the judgment is, *that the writ shall abate*, and no judgment is given for the demandant. Br. Disclaimer, pl. 17. cites 36 H. 6. 28.

The judgment upon disclaimer is no more but

that the demandant shall take nothing by his writ, which is in effect that the writ shall abate. Br. Disclaimer pl. 24. cites 4 E. 4. 38. Per Needham J.

6. If tenant in tail discontinues and die, and the issue brings a *formedon* against the *discontinues*, who pleads *non-tenure* and utterly disclaims the tenancy, judgment shall be that the tenant be fine die, and the demandant may enter notwithstanding the discontinuance. Litt. S. 691.

For more of Disclaimer in general, see Disagreement, and other proper Titles.

* A Discontin-
uance of
estates in
lands or te-
nements is
(properly in
legal under-
standing) an
alienation

made or suf-
fered by te-
nant in tail
by any that
is seised in
quiter droit
whereby the
issue in tail,
or the heirs
or succes-
sors, or

those in reversion or remainder, are driven to their action and cannot enter. Co. Lit. 325. a.

It is an alienation of the possession, where the right of action is left in another; and it began in the case of the husbands alienations of their wives lands. By the civil law the father gave the dos, which was the estate of the wife given on the marriage; and if it consisted of matters moveable the husband had the possession, but was bound to restitution at his death, and even an action was allowed to the wife in case the husband fell to decay, to recover during his life. If it consisted of things immoveable, the husband could not alien without the consent of his wife by the Julian law; and by Justinian's reformation he could not alien though with her consent. Constante matrimonio rei dotalis dominium civile penes maritum est, naturale penes uxorem. Gilb. Treat. of Ten. 99. cites Dig. li. 23. tit. 2. De jure dotium. Ibid. tit. 5. de feudo dotali.

See tit. Copyhold (G. e) pl. 1. Lee v. Browne and the notes there.

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[2. But by the custom such Surrender may be a discontinuance. Mich. 15 Ja. B. R. between Lee and Browne, upon evidence at the bar, the court directed the jury to enquire whether there was such custom.]

Mo. 596.
pl. 813. Bul-
lock v. Dib-
ley. Pasch.
35 Eliz.
S. C. ad-
judged by all the justices,

[3. If a baron seised of a copyhold in the right of his wife, surrenders it to the use of another in fee, who is admitted accordingly, this is not any discontinuance to the feme. Co. 4. Bullock v. Dab-
ley 23. adjudged.]

judged by all the justices, that it was no discontinuance, because no livery was made of such estate, nor can a warranty be annexed to it, for the benefit whereof a discontinuance is admitted; and Brook cited S. P. adjudged accordingly. Mich. 32 and 33 Eliz. Rot. 937. in C. B. in case of Foxley v. Cosen. — Poph. 38. Bullock v. Dibler. S. C. adjudged that it is not any discontinuance. — Co. Comp. Cop. 59. f. 49. S. P. because it is a collateral quality, and not incident. — Cro. J. 105. pl. 44. Mich. 3 Jac. B. R. in case of Collins v. Canke. S. P. and Walmesley held that it was a discontinuance, notwithstanding the case in 4 Rep. 23. a. and notwithstanding a case cited to be adjudged Hill. 1 Jac. Rot. 634. B. R. that such a surrender by tenant in tail made not any discontinuance; and in this case no judgment was given, but they pleaded De novo. — S. P. by Wray accordingly. Le. 95. pl. 124. Hill. 30. Eliz. B. R. and says that so it was holden in the serjeant's case when Audley, afterwards Lord Chancellor of England, was made a serjeant.

Br. Forme-
don, pl. 40.
cites 14 H. 6. 3. and Brook says it is no discontinuance.

[4. A livery in law will not make a discontinuance.]
[5. An exchange will not make a discontinuance.]

* Discontinuance.

(A) What Act or Thing will make a Discontin-
uance.

[1. If a tenant in tail of a copyhold (admitting there may be an estate tail thereof) surrenders the copyhold to certain uses, &c. this is no discontinuance. Mich. 15 Jac. B. R. between Lee and Browne, upon evidence at the bar the court seemed to incline so, and admitted it in their charge to the jury; but they said it had been a great question.]

[6., *As if tenant in tail exchanges with another, that is not any discontinuance, for his issue may enter.* 9 E. 4. 22. 13 E. 4. 3. Perkins S. 294, 295:]

7. *Grant of reversion or advowson by tenant for term of life is no discontinuance, but only a grant which expires by his death, and the other who has right may enter or present, without being put to their action.* Quod nota. Br. Grants, pl. 72. cites 23 Ass. 8.

8. *Confirmation with warranty made by the heir in tail to a tenant for life, habendum to him in tail shall take away the entry of his issue, and the reason seems to be because the warranty makes a discontinuance.* Br. Discontinuance de Possession, pl. 1. cites 3 H. 4. 9.

9. *If tenant in tail infeof the donor in fee, this is no discontinuance, but the issue in tail may enter, for he is not discontinued but where the reversion is discontinued, but here the reversion is not discontinued, for the alienation is made to him who had the fee, and by this alienation the donor gains no fee, for if so he shall have two fee-simples in one land, which cannot be, for the fee simple which he had before remained always in him, by which he cannot have a new fee-simple, and so this estate is not in law but for life of the tenant in tail.* Br. Discontinuance de Possession, pl. 24. cites 9 E. 4. 24.

10. *Tenant for life and remainder in fee of copyhold land within age surrendered to the use of B. B. is admitted tenant for life and remainder man dies. The heir of remainder-man is admitted, and enters into the land, and good.* Le. 95. pl. 124. Hill. 30 Eliz. B. R. Knight v. Footman.

11. *Discontinuance is when he that has an estate tail or fee-simple in another's right, as the husband in right of his wife, a dean sole seised in the right of his deanry, dean and chapter, guardian and chaplains, as also mayor and commonalty of lands in the right of their corporation, makes a larger estate of the land than he may; as by fine or feoffment for the life of the lessee in tail or in fee, which is called a discontinuance.* Fin. Law. 8vo. 190.

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12. *Grant of a rent, release or confirmation to a tenant for years in fee makes no discontinuance, for they pass no greater estate without livery than the grantor had.* Finch's Law. 8vo. 190.

13. *Warranty of an estate of inheritance or for life descending upon him which ought to take such estate, makes a discontinuance* *; as if tenant in tail of an advowson in gross suffer an usurpation by six months, the release of a collateral ancestor with warranty is a discontinuance. Finch's Law. 8vo. 193.

* Co. Litt. 339. a. (i. e.) ab effectu, because it takes away the entry of him that

right has as a discontinuance.

14. *So it seems of a collateral ancestor's release with warranty to the grantee in fee of a rent or an advowson in gross by tenant in tail.* Ibid.

15. *But if tenant in tail of an advowson in gross grant it in fee, with warranty, this is no discontinuance, but at the pleasure of the issue.* Finch's Law. 193.

16. *An*

16. *An act may be a discontinuance now, and not a discontinuance by matter ex post facto.* As if tenant in tail infeoff him in reversion and a stranger, and reversioner survives, it is no discontinuance. So if baron and feme make a lease for life by deed of lands of the feme, if the feme after the death of the husband agrees, it is no discontinuance; but if she disagrees, it is a discontinuance. Per Croke J. Cro. C. 406. pl. 4. Pasch. 11 Car. B. R. in case of Baker v. Hacking,

(A. 2) What Act or Thing is. In Respect of the Persons making it. And what Persons may make it.

1. *VICAR of a church may make a discontinuance by lease for term of life.* Quære inde, for a parson cannot make a discontinuance, for the *fee-simple is an abeyance.* Br. Discontinuance de Possession, pl. 31. cites 9 E. 3. 8. & Fitzh. Juris utrum, pl. 18.

2. *Tenant in tail of the gift of the king, the reversion to the king, made feoffment in fee and re-took to him and his feme, and died, and the issue was within age, and the king seised him and ousted the feme and made her to answer the issues and profits of two parts and endowed her of the third part, because the feoffment is now void; for where the reversion is in the king the tenant in tail cannot discontinue.* Br. Taile & Dones, pl. 41. cites 40 Aff. 36.

3. *Land is given to two, and to the heirs of one who join in a lease for term for life to J. N. it is no discontinuance, nor forfeiture by him who had not but for term of life, because the other who had the fee joined in the lease with him, and there is no new reversion gained.* Br. Discont. de Possession, pl. 33. cites 2 H. 5. 7. & Fitzh. Wast. 54.

4. *If exchange be of lands-tailed or by baron and feme of the land of his feme, this no discontinuance.* Br. Eschange, pl. 5. per Choke, Danby, and Needham, cites 9 E. 4. 19, 20.

[516] 5. *If tenant for life, and he in remainder in tail join in a feoffment, this is no discontinuance, for it is the livery of the tenant for life and the grant of him in reversion, and grant without warranty is no discontinuance.* Br. Discont. de Possession, pl. 38. cites 13 H. 7. 14.

And so it was determined anno 2 M. 1. in Ld. Barkley's case. Ibid.

6. *If land is given in tail to the king, and after the king by his patent leases it for years, or for life, and has issue and dies, the patent is void for it is no discontinuance; for grant without livery does not make any discontinuance; so if he had granted it in fee, this is no discontinuance; and so see that the king may be tenant in tail; for when a man gives to the king in tail, the king cannot have greater estate than the donor will depart with to him.* Br. Tail & Dones, &c. pl. 39. cites 38 H. 8.

7. *A sole body politick that has the absolute right in them, as an abbot, bishop, and the like, may make a discontinuance, but a corporation*

poration aggregate of many as dean and chapter, warden and chaplains, master and fellows, mayor and commonalty, &c. cannot make any discontinuance; for if they join the grant is good; and if the dean, warden or mayor make it alone, where the body is aggregate of many, it is void, and works a disseisin. Co. 325. b.

8. *But by the statute of 1 Eliz. and 13 Eliz. cap. 10. and 1 Jac. cap. 3. bishops and all other ecclesiastical persons are disabled to alien or discontinue any of their ecclesiastical livings, as by the same acts does appear. Co. Litt. 325. b.*

(B) What Conveyance will make a Discontinuance.

[1.] *If tenant in tail levies a fine sur consueance de droit tantum, this is not any discontinuance till execution; for if he dies before execution, the issue may enter. 36 Ass. 8.]*

[2. *If a gift be made to baron and feme, and the heirs of the body of the baron, the remainder to A. in tail, the remainder to B. in tail, the remainder to D. in tail, the remainder to the right heirs of the baron, and the baron and feme and B. join in a feoffment and after in a fine to the feoffees, this is a discontinuance of the remainders, so that A. cannot enter upon the death of the baron without issue, because the baron was seised by force of the tail; and the joining of the feme and him in the mediate remainder in the feoffment, and fine does not alter the case at the common law, but it enures as their (*) confirmation and so operates, that it is not any discontinuance within the statute of 32 H. 8. but a lawful bar. Mich. 9 Car. B. R. between King and Edwards, adjudged upon a special verdict per Curiam, præter Jones, who doubted whether the baron was seised by force of the tail, but agreed with the court in the rest.]*

[3. *If there be tenant in tail, the remainder to his right heirs, and he makes a feoffment in fee, this is a discontinuance, though he that made the feoffment had the fee in him. * 13 H. 7. 22. b. admitted. Pasch. 11 Car. B. R. in the case between Baker and Hacking, agreed per totam Curiam.]*

[4. *If donee in tail and donor join in a lease for life by deed, reserving a small rent, this a discontinuance presently, so that the donor cannot devise his reversion during the life of the lessee, because it is a rule of law, that when tenant in tail makes a * feoffment or lease for life, the lessor being seised by force of the tail, that this shall be a discontinuance, and this is a lease of the donee during his life; P. 11 Car. B. R. between Baker and Hacking, adjudged upon a special verdict by Brampton, Jones, and Barkley, against the opinion of Croke, who held it should not be a discontinuance till the death of the donee, and conditionally that he died during the life of the lessee, and so by consequence the donor may in the mean time dispose of his reversion, inasmuch as the intent of the parties was so; but*

{ Fo 133. }

*S. C. cited per Cur. Cro. C. 405. in case of Baker v. Hacking.

*[517] Cro. C. 387. pl. 19. Mich. 10 Car. B. R. the S. C. and Croke J. held that it is not any discontinuance of the reversion because the tota

reversion
joined with
the tenant
in tail
and it is
quasi a

confirmation of the lease during the life of tenant in tail, and during the time that he has issue, but after his death without issue it is the lease of him in the reversion and during the life of lessee it is a discontinuance quoad the tenant in tail and his issue; but not so as to the reversion for that remains as it was; and Richardson inclined to this opinion, but Berkley doubted; et adjournatur.——But Ibid. 404. pl. 5. Pasch. 11 Car. B. R. S. C. resolved by all the justices contra Croke that the lease for life is only the lease of the tenant in tail during his life and the life of the lessee, and then it is a discontinuance and the reversion taken from him in the reversion is displaced, and this being a lease for life of the lessee the livery is only made by the tenant in tail, he only having power of the freehold and the immediate possession and inheritance; and so the tenant in tail has gained a new fee expectant upon the estate for life, and it is a present discontinuance, and it cannot be a lease for the life of tenant in tail and after his death without issue, a lease for life of him in the reversion.——Hutt 126. Baker v. Hucking. S. C. adjudged by all, præter Croke that it was a discontinuance and not the lease of him in reversion but his confirmation.——Jo. 358. S. C. adjudged accordingly by three justices but Jones e contra.——S. C. cited per Cur. Sid. 83. Trin. 14 Car. 2. B. R.

See tit.
Grants (Y)
pl. 5. S. C.

[5. If a bishop seized in fee of a manor makes a lease for life of parcel of the demesnes, not warranted by the statute of 1 Eliz. of bishops, yet this is not any discontinuance, but the reversion thereof continues parcel of the manor. Pasch. 11 Car. B. R. between Walter and Jackson, adjudged in a writ of error upon a judgment in Banco; and Justice Berkley said, that it was so adjudged in B. in the same term; and now the judgment was affirmed per Curiam, scilicet, that the reversion of this parcel shall pass with the attainment of the first lessee by the grant of the manor.]

See tit.
Grants (Y)
pl. 6. S. C.

[6. [But] if tenant in tail of a manor makes a lease for life, not warranted by 32 H. 8. of part of the demesnes, this is a discontinuance of this parcel, and makes it to be not parcel of the manor, nor shall pass by the grant of the manor with the attainment of the lessee; in the case of Walter and Jackson, it was said by Berkley, that it was so agreed in the said case in Banco.]

7. Land was given to A. and E. his wife and to the heirs of the body of A. who had issue J. and died, and J. granted the reversion over in fee, E. attorned, and J. had issue and died, and after E. died, the grantee entered, and the issue ousted him, and the entry of the issue is lawful, because the grant did yet take effect in the life of J. who died before the tenant for life. Br. Entre Cong. pl. 71. cites 34 Aff. 4.

8. Note for law by award, that where a lease is made to baron and feme for term of life, the remainder to A. in tail, A. released all his right to the baron and feme by deed without warranty, and died; the baron aliened, the issue in tail entered, and his entry adjudged lawful; for where he releases as above without warranty nothing passes but his estate for term of life, and no inheritance. Brooke says, And from hence it seems, that if there had been any warranty that this had been a discontinuance. Br. Discontinuance de Possession, pl. 17. cites 43 Aff. 17. and concordat with this case the same year, fol. 45.

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9. And where tenant for life is, the remainder over in tail, the remainder over in tail and the tenant for life aliens to another for life, the remainder in tail, the second tenant for life died, he in remainder entered,

entered, the entry of him in the first remainder is lawful upon him. Br. Discontinuance de Possession, pl. 17. cites 43 Aff. 17.

10. A *fine levied to one who is in possession before*, so that it cannot otherwise be executed, is no discontinuance, but *some e contra*; but it was agreed that a feoffment or *fine sur cognusance de droit come ceo*, &c. are discontinuances, for they are executed in themselves and are a transmutation of the possession; contrary of a *fine cognusance de droit tantum* or *fine de grant and render*. Br. Discontinuance of Possession, pl. 2. cites 8 H. 4. 7.

11. Where *tenant in tail leases for life and after releases all his right to the tenant for life and his heirs*, this is a discontinuance in fee. Br. Discont. de Poss. pl. 3. cites 21 H. 6. 52. & 43. Aff. 48.

12. *Contra* where tenant in tail leases for years or for his own life and makes such release, this is no discontinuance; for the *grant, release, nor confirmation of the tenant in tail* cannot be a discontinuance but where the tenant in tail at the time of the making it is *seised of fee simple by some particular or other such means*. Ibid. per Littleton.

13. But where tenant in tail leases for life remainder over in fee, this is a clear discontinuance in fee, for *all goes by one and the same livery*; per Littleton & hoc concordatur pro lege. Ibid. This is an absolute discontinuance although the remainder be not executed in the life of tenant in tail, because all is one estate and passes by one livery. And so note a diversity between a grant of a reversion and a limitation of a remainder. Co. Litt. 333. 6.

14. And per Markham, *tenant in tail has issue two sons and dies, the eldest enters and gives in tale to baron and feme, the baron dies, and feme is tenant in tail after possibility of issue extinct*; the *eldest son dies without issue*, and the reversion descends to the *youngest, who releases to the feme all his right, &c. and has issue and dies; the feme dies, and the brother of the feme enters*; the entry of the issue of the youngest son is tolled. Quære; for *he who released was never seised by force of the tail*. Ibid.

15. *Exchange* is no discontinuance, for *there is no livery*; per Danby, Needham, and Chocke, and the heir or feme may enter. Br. Discont. de Poss. pl. 5. cites 9 E. 4. 22. Where the thing does lie in livery, as lands and tenements, yet if to the conveyance of the freehold or inheritance no livery of seisin is requisite, it works no discontinuance; as if tenant in tail exchange lands, &c. or if the king, being tenant in tail, grant by his letters patents the lands in fee, there is no discontinuance wrought. Co. Litt. 332. b.

16. So upon a *devise* by tenant in tail, or a man seised in jure uxoris. Br. Discont. de Poss. pl. 5. cites 9 E. 4. 22. A devise is no discontinuance.

Br. Exchange, pl. 5. per Choke, Danby, and Needham. If a man be seised in tail of lands devisable by testament, &c. and he devises this to another in fee and dies, and the other enters, &c. this is no discontinuance; for that no discontinuance was made in the life of the tenant in tail, &c. Litt. S. 624. — No discontinuance can be made by tenant in tail, but such as is made and takes effect in his life time. Co. Litt. 334. b.

17. If *tenant for life and he in remainder in tail join in a feoffment*, this is no discontinuance, for *it is the livery of the tenant for life, and the grant of him in reversion, and grant without warranty is no discontinuance*. Br. Discont. de Poss. pl. 38. cites 13 H. 7. 14. [519]

18. Grant

18. *Grant without livery* will not make a discontinuance; nor shall it bind, but during the life of the grantor; and the same law of such grant in fee. Br. Discont. de Poss. pl. 35. cites 38 H. 8.

19. A. has issue a son and a daughter, and conveys land in trust for his son and his wife and the heirs of their bodies lawfully begotten, and for default of issue to the use of the daughter and her husband, and to the heirs of the body of the daughter lawfully begotten, and after to the use of A. and his heirs for ever. The son died without issue. A. died. The daughter had issue B. by her then husband; the husband died; the daughter married a second husband and they levy a fine, by which they grant and render a rent of 20l. per annum to C. and D. for their lives. This grant and render is out of the statute of 32 H. 8. 36. of fines, and binds not the issue in tail. Kelw. 210. a. b. Mich. 3 & 4 Eliz.

20. A. tenant in tail, remainder in fee to his sisters, being his heirs at the common law, by deed indented though the words were in the form of a deed-poll, did give, grant, and confirm for a certain piece of money, &c. to W. R. and his heirs, without the words bargain and sell, habendum to the said W. R. with warranty, &c. against A. and his heirs, and a letter of attorney to make livery and seisin; this deed was enrolled within a month after it was executed, and about four months afterwards the attorney made livery and seisin; A. died without issue; the sisters entered, and W. R. the lessee re-entered, and thereupon they brought trespass, and the whole court held for the plaintiff; for here is not any discontinuance, because the conveyance was by bargain and sale, and not by feoffment, and the livery comes too late after the inrollment, and then the warranty shall not hurt them; and though in the deed there are not any words of indenture, and though the words are in the first person, yet the parchment being indented and both the parties having put their seals to it, it is sufficient, and the words, give, grant, agree and confirm for money, if the deed should be duly inrolled, the lands shall pass both by the statute of uses and by the statute of inrollments as well as upon the words bargain and sell. 3 Le. 16. pl. 39. Mich. 14 Eliz. B. R. Anon.

21. Tenant in tail made a lease for the life of lessee, according to the statute of 32 H. 8. The same was held not to be a discontinuance. 4 Le. 191. pl. 301. Hill. 19 Eliz. B. R. Vernon v. Stavelev.

22. Tenant in tail makes a bargain and sale and makes livery, and within six months inrolls it; this is adjudged a discontinuance, and yet the bargain and sale is not any discontinuance; per Anderson Ch. J. Goldsb. 25. pl. 6. Trin. 28 Eliz. cites Plowd. C. Bracebridge's case.

A deed inrolled made by tenant in tail makes no discontinuance; per Brown J. Mo. 28. pl. 90.

23. A. tenant for life, remainder in tail to B. remainder to A. in fee, A. and B. makes a lease for three lives by indenture. A. dies. B. grants the reversion to C. in fee to the use of his last will, and

and after devised the reversion for years and dies; the three lives die; devisee for years enters; the heir of the body of B. ousts him; adjudged that the lease for three lives was no discontinuance. Cro. E. 56. pl. 4. Pasch. 29 Eliz. B. R. Trevilian v. Lane.

24. In trespass, the defendant pleaded, that A. N. his ancestor was seised, and died seised, and that the lands descended to him as son and heir; the plaintiff replied, that long before A. N. any thing had * in the land, *J. S. was seised in fee, and enfeoffed four persons to the use of himself, and his wife for life, and after to the use of W. his son for life, and after, that they shall be seised ut in eorum pristino statu, on condition they shall receive the profits, and pay to B. wife of W. 10 l. during her life, and after to the use of the heirs males of W. Baron and feme died. W. entered and infeofed A. N. and died; and afterwards the wife of W. died.* The court held that the feoffment was no discontinuance, nor barred the entry of the heir. Cro. E. 277. pl. 10. Pasch. 35 Eliz. B. R. Mason. v. Nevil.

The reporter observes, that the court gave no reason for their judgment, and therefore makes a quære. Ibid.

*[520]

25. If tenant in tail leases for years, and after makes feoffment with livery by attorney, to which tenant for years assented it is a discontinuance. And. 130. Mich. 27 & 28 Eliz. Darrel v. Stukely.

D. 363. a. pl. 22⁷ Pasch. 20 Eliz. S. P.

26. A. feme tenant for life marries him in remainder in tail, and then they levy a fine, this does not discontinue the tail. Cro. E. 827. pl. 32. Pasch. 41 Eliz. C. B. Peck v. Channel.

S. C. cited per Cur. Lev. 38. Trin.

13 Car. 2. B. R.

27. If tenant in tail of rent grants it with warranty, this is no discontinuance, although that assents descend; but a distress may be taken for the rent. But if a *formedon in the descender* be brought, he shall be barred. 3 Rep. 85. a. Pasch. 44 Eliz. in the case of fines.

Fin. Law. 8 vo. 193. S. P.

28. A fine or feoffment for the life of the lessee in tail or in fee is a discontinuance; but a grant (* of a rent) release or confirmation (to a lessee for years in fee) is no discontinuance; for they pass without livery, and therefore pass no greater estate than the grantor had. Finch. Law, 8vo. 190.

* Reversion, or remainder or any other thing that lies in grant,

(though by a fine) Litt. S. 618.

29. To every discontinuance there is necessary a divesting or displacing of the estate, and turning the same to a right; for if it be not turned to a right, they that have the estate cannot be driven to an action. And that is the reason that such inheritances as lie in grant cannot by grant be discontinued, because such a grant divests no estate, but passes only that which he may lawfully grant; and so the estate itself does descend, revert or remain. Co. Litt. 327. b.

30. If tenant in tail makes a lease for years of lands, and after levies a fine; this is a discontinuance, for a fine is a feoffment of record, and a freehold passes. Co. Litt. 332. b.

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31. But

31. *But if tenant in tail makes a lease for his own life, and after levies a fine, this is no discontinuance, because the reversion expectant upon an estate of freehold, which lies only in grant, passes thereby.* Co. Litt. 332. b.

32. If tenant in tail makes a lease for three lives according to the statute 32 H. 8. that is no discontinuance of the estate tail, or of the reversion, because it is authorized by act of parliament, whereunto every man in judgment of law is party. Co. Litt. 333. a.

33. And yet in some cases the freehold may be discontinued, and not the reversion. As if the husband and wife make a lease for life by deed of the wife's land, reserving a rent, the husband dies; this was a discontinuance at the common law for life, and yet the reversion was not discontinued, but remained in the wife. Otherwise it is if the husband had made the lease alone. Co. Litt. 333. a.

34. B. tenant in tail makes a gift in tail to A. and after B. releases to A. and his heirs, and after A. dies without issue, the issue of the first donee may enter upon the collateral heir, because A. had no seisin and execution of the reversion of the land in his demesne as of fee. Co. Litt. 333. b.

[521] 35. *But if tenant in tail makes a lease for life of the lessee, and after releases to him and his heirs; this is an absolute discontinuance, because the fee simple is executed in the life of tenant in tail.* Co. Litt. 333. b.

36. *Note, that the cases in Littleton, tit. Discontinuance, where tenant in tail shall not discontinue by his release, are no otherwise but where he leases for years or for his own life, and after releases to the tenant in fee, this is no discontinuance; for he was tenant in tail at the time of the making the release. But contrary where he leases for life of the tenant, and after releases to him in fee, this is a discontinuance in fee; for he had the fee at the time of the release, and this fee was executed in the other in the life of the tenant in tail.* Br. Discon. de Poss. pl. 3.

Co. Litt.

332. b. says, this is added to Littleton, but that the case is good in law, because neither the lease for years, nor the grant of the reversion devesteth any estate.

37. If I give land to another in tail, and he lets the same land to another for term of years, and after the lessor grants the reversion to another in fee, and the tenant for years attorns to the grantee, and the term expires during the life of tenant in tail; by which the grantee enters, this no discontinuance. Litt. S. 619.

S. P. For the grantee's entry works a second notoriety, which plainly ma-

38. *But if tenant in tail make a lease for life of the lessee, and the tenant for life dies, living the tenant in tail, and the grantee of the reversion enters, this is a discontinuance in fee, for the reversion being executed in the life of tenant in tail, it is equivalent in judgment of law to a feoffment.* Litt. S. 620. and Co. Litt. 333. b.

nifests a discontinuance of the intire fee simple. But it may be asked why such grant operates by the subsequent entry, to pass more than it lawfully may pass; for if the grant and attornment only operates to pass a rightful estate, why does the subsequent entry in pursuance of such grant make it pass a wrongful one? The answer is plain; the grant and attornment of tenant for life passes the new reversion depending upon that estate for life, but since grants in their own nature are secret, and therefore pass no more than they lawfully may pass; it follows that this grant and attornment

attornment alone cannot pass the reversion, so as to disinheret the tenant in tail ; but if it be executed by entry, then it will ; for the entry is a notoriety, that the grantor intended to perpetuate the discontinuance, and to continue a right of possession distinct from the propriety, and must be equal to a second feoffment, which he might make when tenant for life dies, during his life ; but if he had died before tenant for life, he had not been capable of such feoffment, and consequently of no discontinuance that is tantamount ; for the grant and attornment of tenant for life shews an endeavour to pass the new reversion, and the entry in pursuance thereof must be to all manner of purposes tantamount to a new feoffment, and therefore continues the right of possession distinct from the propriety, and is by the law construed not to operate as a grant merely, but taking the acts most strongly against the parties, it is interpreted to operate as a feoffment. Gilb. Treat. of Ten. 113, 114, 115.

39. If tenant in tail make a lease for life, and grants the reversion in fee, and the lessee attorns, and that grantee grants it over, and the lessee attorns, and then the lessee for life dies, so as the reversion is executed in the life of tenant in tail. Yet this is no discontinuance, but that after the death of tenant in tail the issue may enter, because (as Littleton here says) he is not in of the grant of the tenant in tail, but of his grantee. Co. Litt. 333. b.

If tenant in tail makes a lease for life, this works a discontinuance during the estate for life,

because he parts with the freehold out of him, gains a new reversion to the tenant in tail. Now if he grants this new reversion in fee, and tenant for life attorns, and tenant in tail dies during the life of tenant for life, and then tenant for life dies, the issue in tail may enter, because by this the discontinuance is at an end by the death of tenant for life ; and the grant of the reversion being secret, must be intended to pass no more than it lawfully might pass, unless it were executed by entry into the possession ; for since it operates only as a grant, it must be only intended to pass the reversion during the life of tenant in tail, which he had a lawful power to grant, and not establish a right of propriety distinct from the right of possession. But if a man had thus granted the reversion, and tenant for life had died, and then the grantee had entered by force of the grant, and the tenant in tail had died, this had worked a discontinuance. Gilb. Treat. of Ten. 113.

40. If tenant in tail makes a lease for life, and after disseises the lessee for life, and makes a feoffment in fee, the lessee dies, and then tenant in tail dies, although the fee be executed, yet for that the fee was not executed by lawful means, it is no discontinuance. Co. Litt. 333. b.

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41. If tenant in tail makes a lease for life of the lessee, he discontinues the entail during the life of the lessee, and gains a new reversion in fee, and if he after grant this reversion in fee, and lessee dies, or surrenders or forfeits in the life of tenant in tail, this is a discontinuance in fee, because the grantee was seised in demesne as of fee in the life of tenant in tail by force of this grant ; but if tenant in tail dies before the grant in fee be executed by death, &c. of tenant for life, the discontinuance determines upon the death of tenant for life, though the grant were with warranty, * which being annexed to an estate passing by grant, cannot bar the entry of the issue because the estate to which it is annexed is void at his election. Hawk. Co. Litt. 422, 423.

Co. Litt. 3. 620.

42. W. infeoffed husband and wife, habendum to them and to the heirs of their bodies between them to be begotten, and they being so seised of the whole land in fee-tail, the husband infeoffs the youngest son in fee of the lands, and died, and then the wife died before she made any entry ; the eldest son entered into the land. The question was upon the statute of 32 H. 8. as to feoffments, &c. made by the husband during coverture, and Sir Edward Coke held, that the heir

* What follows is a note of the serjeant's.

8. Rep. 71. b. Pasch. 7 Jac. Grenceley's case. S. C. resolved that the entry of the issue in tail was lawful, and if the

issue in tail shall not be within those words (*her heirs*) mentioned in the said statute, because he is heir to both, yet without question he is within those other words in the said statute, (*or to such as have right by the death of su. b. wif.*) is not barred of his entry by the statute. Brownl. 131. Hill. 5 Jac. Greenly v. Passey.

43. *Tenant in tail bargains and sells to another, with warranty* to him, his heirs, and assigns; this is no discontinuance to him in remainder or reversion, neither can the bargainee re-but in a formdon in the reverter, because the estate to which the warranty is annexed is determined. 10 Rep. 95. b. 96. b. Mich. 10 Jac. Seymour's case.

44. *Tenant after a bargain and sale levies a fine to the bargainee and his heirs with warranty*, this is no discontinuance; for the fine operates upon the estate precedent, and passes nothing, but if the fine had been levied before the bargain and sale enrolled, this had been a discontinuance. 10 Rep. 96. a. Mich. 10 Jac. Seymour's case.

45. Land was given to the use of *B. and his wife, and the heirs of the body of B.* and for default of such issue the remainder to the right heirs of B. *B. makes a feoffment in fee with warranty*, and takes back an estate to him and his wife for their lives, the remainder to L. and M. two of his daughters and their heirs, and dies, leaving four daughters; the wife enters and dies. It was insisted, that it was no discontinuance, because the husband and wife were jointenants for life with an estate tail expectant in the husband, and none can discontinue the tail, if he was not seised of it; and in this case it is plain, that the husband was not seised of it at the time when he made the feoffment, because he and his wife were jointenants in tail, but adjudged this is a discontinuance, and by the livery and seisin B. was out of possession, and no remitter can be before an entry, and the warranty is here attached before entry. 2 Bulst. 29. Mich. 10 Jac. Horewood v. Holman.

[523] 46. If disseisor of estate tail makes a *bargain and sale by deed enrolled*, and issue in tail releases with warranty, it is a discontinuance, though neither bargainee had entered and had possession, nor the issue in tail had once been seised by force of the tail. Resolved. Jo. 397, 398. pl. 7. Mich. 13 Car. B. R. Fitzherbert v. Leech.

(B. 2.) What Conveyance is a Discontinuance.

In Respect of the Warranty.

1. **I**N dower baron and feme tenants in tail had issue two sons, and the baron died, the feme leased to the eldest son for years, and after released to him and his heirs with warranty, he took feme, and died without issue, and after the mother died, and the youngest son

son entered, and the feme of the eldest son brought writ of dower and recovered by judgment, and therefore it seem that a release with warranty is a discontinuance, nevertheless this judgment was contrary to the opinion of several. Br. Discont. de Poss. pl. 7. cites 24 E. 3. 28.

2. If a man leases for life and after grants the reversion to A. in tail, which A. granted it to B. in fee with warranty, the tenant attorned, the donee had issue and died, and after the tenant for life died, and the issue entered, and B. ousted him, and he brought assise, and B. pleaded the grant of the tenant in tail with warranty, and yet the assise was awarded, quod nota, his entry lawful. And so seg that grant of reversion by tenant in tail with warranty makes no discontinuance of the tail, if the reversion does not fall to the possession in the life of the grantor, sicut non fecit hic. Quod nota, warranty makes no discontinuance. Br. Discont. de Poss. pl. 14. cites 36 Ass. 8.

3. In assise; tenant in tail after possibility of issue extinct aliens with warranty, he in remainder or in reversion may enter notwithstanding the favour of the warranty, quod nota. Br. Entre Cong. pl. 84. cites 43 Ass. 24.

4. If tenant in tail of an advowson in gross aliens the advowson with warranty, this is no discontinuance, but the issue in tail may have quare impedit, but if he has assets in fee by descent, he shall be barred. Per Mowbray quod non fuit deductum, nevertheless quare inde. Br. Discont. de Poss. pl. 30. cites 43 E. 3. 26.

5. In assise, a man gave to N. in tail, who had issue O. by K. his wife, and died, and O. endowed K. and K. leased to D. and J. his feme for term of their lives and died, and O. confirmed the estate of the baron and feme in tail with warranty, and the baron and feme died and after O. died, the heir of the baron and feme in tail entered, and the issue of O. ousted him, and the issue of the baron and feme brought assise, and by the best opinion the entry of the tenant was not lawful, by reason of the confirmation of his father with warranty, for it seems that by the confirmation and warranty, it shall enure to a discontinuance in effect. Br. Entre Cong. pl. 19. cites 3 H. 4. 9.

6. If tenant in tail of rent grants it in fee, this is no discontinuance; for it is by grant without livery, which is only his interest which he may lawfully grant. Contra if he grants it in fee with warranty, this is a discontinuance in fee, note the difference. Br. Discont. de Poss. pl. 3. cites 21 H. 6. 52. & 43 Ass. 48.

7. And yet it was agreed, that where tenant in tail leases for life and grants the reversion over in fee with warranty and dies before the tenant for life and after the tenant for life dies this is no discontinuance in fee notwithstanding the warranty. Ibid.

8. Where a man infeoffs another with warranty, there an entry lawful or a recovery made or had by a stranger by elder title before that the tenant has vouched in præcipe quod reddat, or before request of warranty

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S. P. Br.
Warrantia
Chartæ pl.

11. cites warranty made in assise shall defeat the warranty. Br. Garrantries
21 H. 6. 41. pl. 32. cites 21 H. 6. 45.

22.
S. P. Br. 9. *Contra after voucher or request made.* Ibid.
Warrantia
chartæ pl. 11. cites 21 H. 6. 41. and 22 H. 6. 22.

S. P. Br. 10. *Contra of release made by him who has entry lawful; there it*
Warrantia shall not determine the warranty; for the possession continues as to
Carte, pl. this regard. Ibid.
11. cites
41 H. 6. 41. and 22. H. 6. 22.

11. If a man gives land to the father and son and to the heirs of the body of the father begotten, the father makes a feoffment in fee, of the whole with warranty and dies, there by all the justices the son may enter into the moiety for the disseisin, and have his action for the other moiety, and so a discontinuance of a moiety, nota. Br. Discont. de Possession, pl. 4. cites 22 H. 6. 51.

12. It was admitted, that where the Duke of Norfolk had the office of the marshal in tail and granted it with warranty to B. for life and the grantor died, and it was found that the duke died seised of the office in tail and the heir within age, by this B. is out of possession, but it is admitted that he may traverse, and then it seems that the grant is not void by the death of the tenant in tail, but that the grant and the warranty is a discontinuance and the grantee out of possession, because his grant is not found in the office, and may aid himself by traverse. Br. Discont. de Possession, pl. 20. cites 5 E. 4. 3.

13. *Tenant for life, the remainder over in tail; the tenant for life dies, and J. N. intrudes, in whose possession he in remainder releases with warranty in fee, and has issue and dies, the issue cannot enter, for by the opinion of all the justices this release with warranty is a discontinuance; for this release countervails the entry and feoffment in this case and the warranty shall enure upon the possessor in fee, by which warranty the entry of the issue is taken away. As if tenant in tail be disseised, and after releases, this is a discontinuance. But Catesbie contrary, and that it is not a discontinuance, for he who released never had possession, and therefore demurred in law. And see Littleton's Tenures, tit. Discontinuance and tit. Garantie, that warranty makes a discontinuance as here; though he who released with warranty was not seised by force of the tail.* Br. Discont. de Possession, pl. 21. cites 12 E. 4. 11.

14. *Tenant in tail of a rent grants the rent, this is no discontinuance, and notwithstanding that it be with warranty, yet by the best opinion it is not a discontinuance; for warranty shall not enure but upon the estate, and the rent was granted in tail, and had not esse before, so that there never was fee-simple of it, therefore it is doubted if the grantee may have thereof fee-simple nevertheless quære, if he may not have fee-simple determinable upon the estate tail.* Br. Discont. de Possession, pl. 6. cites 15 E. 4. 6.

15. If

15. If collateral warranty descends upon an infant within age, he may enter within age, or at full age, at his pleasure to defeat the warranty. Br. Entre Cong. pl. 102. cites 18 E. 4. 13.
28 Aff. 28. where his entry was lawful before, per Shard, Stanton and Birton, so that it seems contrary if his entry be not lawful before.

S. P. Br.
Entre /
Cong. pl.
65. cites

16. If tenant in tail of rent disseise the ter-tenant, and makes a feoffment in fee with warranty, this is no discontinuance of the rent, per Hanb. Davers and Brian, because the warranty is of the land. But Townsend contrary, and that the warranty of the land extends to all that may issue out of the land, and the rent is not extinct but suspended. Br. Discont. de Possession, pl. 18. cites 3 H. 7. 12.

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Co. Litt.
332. b. (r)
S. P. and
S. C. in the
margin.

17. And if tenant in tail of rent releases with warranty to the tenant of the land, this is no discontinuance, per Townsend. Br. Discont. de Possession, pl. 18. cites 3 H. 7. 12.

18. Rent does not lie in discontinuance; for though tenant in tail grants it in fee with warranty and dies, yet the heir may distrain, and it is no discontinuance. But if he will bring a formedon he shall be barred if he has assets, for this is his folly, but contrary if he will distrain, per Kingmill justice and Marro. Br. Discont. de Possession, pl. 9. cites 21 H. 7. 9.

S. P. Ibid.
pl. 25. cites
48 E. 3. 9.
Pe. Wyche.
J.—Br.
Garranties,
pl. 40. cites
S. C.—

S. P. and yet if collateral warranty descends upon such grant of rent or advowson, it shall be a bar to the heir in tail by the best opinion of the justices because the grantee has fee in it till the heir has distrained or presented to the advowson. Ibid. pl. 34. cites 21 H. 7. 40.

* Because the grantee has fee by the grant. Per Vavisor. Quod fuit concessum. Ibid. pl. 34. cites 21 H. 7. 40.

19. So of a release of rent by tenant in tail with warranty, per Marro. Br. Discont. de Possession, pl. 9. cites 21 H. 7. 9.

20. Nevertheless by Kingmill, if tenant in tail of a rent purchases the land in fee, and makes a feoffment of the land with warranty, this is a discontinuance of the rent; for land lies in discontinuance. And the same law by Frowicke Ch. J. and that it should have been a good bar if it had been well pleaded as it was not. Br. Discont. de Possession, pl. 9. cites 21 H. 7. 9.

21. Or if tenant in tail is disseised and releases with warranty and dies these are not discontinuances, per Marro. Br. Discontinuance de Possession, pl. 9. cites 21 H. 7. 9.

Such re-
lease is a
discontin-
uance if the

issue in tail be heir to the warrantor. 3 Rep. 85. b. Pasch. 44. Eliz. in the case of fines. Litt. S. 601. says, this is a discontinuance by reason of the warranty. Because if the issue in tail should enter, the warranty should be destroyed, and therefore to the end that if assets descend in fee-simple, the lessee may plead the same and so bar the demandant, and so all rights and advantages are saved. Co. Litt. 328. a. b.

Such release with warranty is a discontinuance; because it amounts to entry and feoffment, per Periam. Mo. 256. in case of Briscoe v. Chamberlaine. So if issue in tail before entry releases with warranty to the disseisor of his father, this is a discontinuance and takes away the entry of his issue without warranty and he is put to his action. Jo. 397. pl. 7. agreed per tot. Cur. Mich. 13 Car. B. R. Fitzherbert v. Leech.

22. If the baron discontinues the right of his feme, and ancestor collateral of the feme releases with warranty and dies, to whom the feme is heir, and after the baron dies, the feme shall be barred in cui in vita by this warranty notwithstanding the coverture, because she is

put to her action by the discontinuance; for coverture cannot avoid warranty but where the entry of the feme is lawful, which is not upon a discontinuance. Br. Garrantes, pl. 84. cites M. 33. H. 8.

23. Where a man may avoid the possession upon which the warranty is descended, as if a *stranger has entry lawful by reason of disseisin, or by a condition, &c.* which is *mesne between the tail and the possession and warranty of the purchaser*, there, when the *possession upon which the collateral warranty was made is defeated*, the collateral warranty is also defeated. Br. Garrantes, pl. 31. cites Litt. tit. Garr.

24. So where it cannot descend by reason that he who made it is *attainted of felony, or the like.* Ibid.

[526] 25. Warranty of an estate of inheritance or for life, descending upon him that ought to have such estate, makes a discontinuance; and if tenant in tail of an advowson in gross, suffers an usurpation by six months, the release of a collateral ancestor with a warranty is a discontinuance: for he has fee by the usurpation. Finch's law 8vo, 193.

26. So it seems of a collateral ancestor's release, with warranty to the grantee in fee of a rent or advowson in gross by tenant in tail; but if tenant in tail of a rent or advowson in gross grant it in fee with warranty, this is no discontinuance, but at the pleasure of the issue. Finch's law, 8vo. 193.

27. In ejectione firmæ upon a demurrer the case was thus; A. gives to the eldest brother in tail, the remainder to the youngest brother in tail, the remainder over to B. in fee. The eldest leases for three lives, according to the statute of 32 H. 8. with warranty and dies without issue, which descends upon the younger brother, who enters and leases to R. for years; and it was resolved that the entry of the younger brother was lawful, and not hindered by the warranty; for the remainder was not devested, because that lease was not a discontinuance. Pasch. 40 Eliz. Noy. 66. Reeve v. Cox.

28. * A feoffment made by tenant in tail is a discontinuance, with or without warranty; but a † release or confirmation is not, for a man can pass no more thereby than he may lawfully pass, but ‡ warranty added to a release or confirmation to a disseisor works a discontinuance, if it descends to him that right has; § but if one having a son marries a second wife, and land is given to the husband in special tail, and he has issue by his second wife, and is disseised and releases with warranty and dies, ¶ or if tenant in tail of borough-english-land has issue two sons, and is disseised and releases with warranty to the disseisor and dies, yet the intail is not discontinued in either case, because the warranty always descends to the heir at law. Hawk. Co. Litt. 420.

29. Warranty of itself shall not be any discontinuance except the warranty and right descend together to the same issue. Lat. 65. Pasch. 1 Car. Arg. cites Litt. S. 737.

30. As if tenant in tail has issue two daughters by two venters and dies, and they enter and a stranger disseises them, and one of them releases.

● Litt. S.

599.

† Litt. S.

601.

‡ Litt. S.

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§ Litt. S.

602.

¶ Litt. S.

603.

leases by deed to the disseisor with warranty all her right, and dies *without issue*, the surviving sister may enter and oust the disseisor, because she is no heir to the warranty, and therefore no descent. Lat. 65. Arg. in case of Saul v. Clerk.

31. B. tenant in tail to him and the heirs male of his body, reversion to A. his eldest brother in fee. B. made a lease for three lives, with warranty against all persons not warranted by the statute of 32 H. 2. cap. 28. and afterwards in 6 Eliz. levied a fine with proclamations, with warranty against all persons to T. and died without issue male, leaving issue only E. his daughter; the lease for lives expired 18 Eliz. In 30 Eliz. A. died without issue, the said E. being his niece and heir. It was moved, whether this warranty in the fine (admitting there were no proclamations and no non-claim) should make a discontinuance in fee and bar E. or whether the warranty was determined by the death of B. All the justices except Whitlock (who spake not to that point) conceived, that the warranty continued and was a bar to E. for that by the estate for lives it was discontinued, and B. had a new fee, and then when he by fine granted that reversion with warranty, the warranty is annexed to the fee, and binds him that has the right, for the reversion being devised and displaced the fine and warranty enure thereupon, and consequently, though the warranty did not descend upon A. who had the right of reversion, but upon E. yet when A. was dead without issue, the right descended * to E. and she is barred by the fine. Cro. C. 156. pl. 5. Pasch. 4 Car. B. R. Salvin v. Clarke.

and misreported. 1st, Because it says, the lease for lives was a discontinuance of the reversion, and thereby a new fee gained to tenant in tail, which he passed away by the fine with warranty, which could not be; for in the case it appears, the lease was warranted by the statute of 32 H. 8. and then it could make no discontinuance, nor no new fee of a reversion could be gained, and then no estate to which the warranty was annexed, and so was it resolved 40 El. KEEN AND COPE's case. That opinion was extra-judicial, it being concerning a point not in the case, but supposed. That case was resolved upon the point of non-claim, and not upon this of the warranty, which was not a point in the case. Some of the judges therefore spoke not to that point, as appears in the case.

Lat 64. 72. S. C. by name of Saul v. Clerk, but I do not observe the S. P. there. — Jo. 208. pl. 4. S. C. but S. P. does not appear. — Vaugh. 383 in case of Bole v. Horton, Mich. 25 Car. 2. C. B. Vaughan Ch. J. cites S. C. & S. P. and says, that the case as reported by Crooke is all false

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32. A tenant in tail levies a fine to the use of J. S. for the life of J. S. with warranty, and after that levies a fine to the use of himself, and his heirs with warranty, and after that bargains and sells to another and his heirs. And by Holt Ch. J. and Powell, it was held, 1st. That the first fine made a discontinuance, but it was only a discontinuance for the life of J. S. because the wrongful estate that causes the discontinuance was only an estate for life, and the discontinuance could remain no longer than that estate.

2dly, The second fine could not enlarge the discontinuance, because the estate raised by the fine returned back to the consor, and consequently the warranty which was annexed to it was extinguished; and it would be a vain thing to make a discontinuance for the sake of that warranty, which was destroyed in its creation.

3dly, Suppose the second fine had been levied to R. S. a stranger, yet during the life of the first consor this second fine makes no discontinuance, because the estate was turned to right by the first fine, and the second fine could not turn it more to a right; so as it is not a present or an immediate discontinuance; but if the first consor die in the

the life of tenant in tail, then it becomes a discontinuance; for the new reversion, which tenant in tail gained, and to which the warranty was annexed, is executed in possession of R. S. and there was no right of entry or action in any body when the estate was executed; for the tenant in tail could not enter, and the issue had no right; and they compared it to Litt. S. 620. 622. 1 Salk. 244, 245. Hill. 1 Ann. B. R. Hunt v. Burn.

(B. 3) In Respect of the Time of the Grant's taking Place or Effect.

1. **I**N assise land was given to the baron and feme, and to the heirs of the body of the baron, who had issue J. The baron died, and J. granted the reversion to W. N. in fee, and the feme attorned, and after J. had issue T. and died, and after the feme died, and this grantee of the reversion entered, and T. ousted him, and the entry of T. lawful, because the grant did not take effect in the life of J. who died before the feme, and therefore no discontinuance. Br. Discont. de Poss. pl. 12. cites 34 Ass. 4. & 36 Ass. 8.

[528] 2. Assise was adjourned out of the county of Devon into C. B. A. tenant in tail leased to B. for life, and after granted the reversion in fee to J. S. and B. attorned, and after B. granted his estate to J. S. A. had issue and died, and after B. died, and the issue in tail entered upon J. S. in reversion, and J. S. brought assise, but the issue in tail traversed the grant of the estate of B. to be in the life of the tenant in tail, and the court doubted of the discontinuance in fee. Markham said this is a discontinuance in fee, because it was executed in J. S. in reversion by the grant of the estate of B. the tenant for life in the life of A. the tenant in tail; for this grant of B. was a surrender, and then J. S. was in in fee by the tenant in tail, and is not in by the tenant for life; for this is a surrender. But in this case if B. had survived A. and B. in life of A. had not made such grant to J. S. then it had not been a discontinuance in fee but for term of life only, and there the issue in tail after the death of B. might have lawfully entered upon J. S. because the fee was not executed in the life of B. Br. Discont. de Poss. pl. 3. cites 21 H. 6. 52. & 43 Ass. 48.

3. And where a tenant in tail leases for term of his own life to B. the remainder to J. S. in fee, and A. has issue and dies, the entry of the issue in tail is lawful upon J. S. for this is no discontinuance in fee, quod nota, good case. Ibid.

4. Where tenant in tail leases for life, and after grants the reversion to another in fee, and the tenant attorns and does waste, and he in reversion brings writ of waste and recovers the place wasted in the life of the tenant in tail, there this is a discontinuance in fee. Br. Discont. de Poss. pl. 3. cites 21 H. 6. 52. & 43 Ass. 48.

5. So it seems if the tenant for life aliens in fee, or prays in aid of a stranger in præcipe quod reddat, so that he in reversion enters in the life of the tenant in tail, this is a discontinuance in fee. Ibid.

6. So if tenant in tail leases for life, and after confirms the estate of the tenant for life in fee, this is a discontinuance in fee. Ibid.

7. And where the fee is not executed in the grantee of the reversion nor his heirs in the life of the tenant in tail who granted, there the entry of the issue in tail is lawful after the death of the tenant for life, because the fee was not discontinued, but only the frank-tenement for term of life; quod nota; per judicium. Ibid. cites 43 E. 3. 48.

(B. 4) Bound thereby. Who.

1. A discontinuance made by the husband did take away the entry only of the wife and her heirs by the common law, and not of any other which claimed by title paramount above the discontinuance. Co. Litt. 327. b.

2. As if lands had been given to the husband and wife, and to a third person and to their heirs, and the husband had made a feoffment in fee, this had been a discontinuance of the one moiety, and a disseisin of the other moiety; if the husband had died, and then the wife had died, the survivor should have entered into the whole, for he claims not under the discontinuance, but by title paramount from the first feoffor; and seeing the right by law doth survive, the law does give him a remedy to take advantage thereof by entry, for other remedy for that moiety he could not have. Co. Litt. 327. b.

3. If the reversion or remainder be in the king, the tenant in tail cannot discontinue the estate tail. Co. Litt. 335. a.

king is donor, and not otherwise, as appears by the preamble of the statute. Mo. 115. pl. 258. Pasch. 20 Eliz. Jackson v. Darcey.

This shall be intended where the

4. But tenant in tail the reversion in the king might have barred the estate tail by a common recovery until the stat. 34 H. 8. cap. 20. which restrains such a tenant in tail, but that common recovery neither barred nor discontinued the king's reversion. Co. Litt. 335. a.

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(B. 5) Removed, or Purged.

1. A man seized in jure uxoris infeoffed A. upon condition to lease to him and his feme for life, the remainder to B. in tail, the remainders to the right heirs of the baron; the baron died, and A. leased to the feme for life, the remainder to B. in tail, the remainder to the right heirs of the feme, by which the heir of the baron entered for the condition broken, and the feme entered upon him, and well, per tot. Cur. except Cheiney, for by the entry of the heir of the baron the discontinuance is purged and defeated, and so the entry of the feme

Br. Conditions, pl. 71. cites S. C. —S. P. Br. Entre Cong. pl. 38. cites 4 H. 7. 3. And if tenant for life aliens in fee upon condition,

and the
tenant en-
ters for the
condition broken,

feme is lawful. Br. Discontinuance de Possession, pl. 8. cites 4 H. 6. 2.

condition broken, this reverts the reversion in the lessor.

2. The baron and feme and a third person purchase jointly; the baron aliened the whole, and died, and after the feme died, and then the third person entered, the alienee ousted him, and he brought assise, and recovered the whole, because by the death of the baron the third person and the feme were intitled to have writ of right and revive the jointenancy, and of the alienation of the baron the third person cannot have cui in vita. And therefore he shall recover by assise and by entry, Quod nota alienation, which was a discontinuance, is now purged by the death of the feme, and the entry of the third person revived for the whole. Br. Discontinuance de Possession, pl. 13. cites 35 Ass. 15.

3. Discontinuance takes away the entry of those that come to have title after his death. If he (whose entry is barred by a descent or discontinuance) have the freehold cast upon him by a new title, he shall be in of his ancient title; which is termed a remitter. Finch's Law, 8vo. 193, 194.

4. As if the heir of the disseisor (in by descent) makes a lease for life to J. S. the remainder for life or in fee to the disseisee, if tenant in tail discontinue, and then disseises the discontinuee, and dies seised, whereby the lands descend to his issue; or if the husband make a feoffment in fee of land in right of his wife, and takes back an estate in fee to him and his wife. In these cases the disseisee after the death of J. S. the issue in tail, and the wife surviving, her husband is remitted; but if the husband survives, her heir is not; for there is another tenant of the freehold, against whom he may bring his action. And in the case of tenant in tail before, though the heir of the discontinuee were within age at the time of the descent to the issue in tail, yet his entry is gone for ever, by reason the issue is remitted. Finch's Law, 8vo. 194.

5. The reversion may be revested, and yet the discontinuance remain. Co. Litt. 335. a.

Hawk. Co.
Litt. 425.
makes a
quere, how
the discon-
tinuance
can remain
since the estate
which passed
by livery, and
was the only
cause the dis-
continuance is
defeated by
the entry of
the lessor.

6. As if a feme covert be tenant for life, and the husband makes a feoffment in fee, and the lessor enters for the forfeiture; here is the reversion revested, and yet the discontinuance remained at the common law. Co. Litt. 335. a.

[530]

N. B. What
is W. in the
parentheses
is out of
Skin. 2, 3.
and not in
Vent. 357,
358. and
differ as
to the death

7. A. tenant in tail, remainder to B. in tail, remainder over, &c. A. makes a lease to J. S. for the life of J. S. not warranted by the statute, and dies without issue, leaving B. in remainder his heir, to whom the reversion in fee descends. B. leases to W. R. (living J. S.) for 99 years to commence after the death of J. S. reserving rent. J. S. surrenders to B. (and C.) upon condition, and dies. Then a præcipe is brought against B. (and C. a stranger) and a recovery with single voucher had (to the use of B. and her heirs, and after the condition is broken and) lessee for years enters (B. grants

grants the reversion, then J. S. dies.) The defendant the heir of B. distrains for the rent. W. R. brings a replevin (and the defendant avows for the rent reserved upon the 99 years lease as claiming under the grantee of the reversion.) It was agreed that this was a discontinuance and a tortious reversion in fee, out of which the lease was made; but whether by the surrender this tortious reversion being gone the lease should be so too was the doubt of the case. See Vent. 357. Mich. 33 Car. 2. B. R. Anon. and Skin. 2. S. C. by the name of Paulin v. Hardy.

of J. d. —
Freem.
Rep. 258,
259. pl.
276. Pay-
don v.
Hardy. S.
C. Hill.
1678. held
that this
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life did

make a discontinuance of that estate-tail and remainders during the continuance of the estate for life, during which time the tenant in tail had a tortious-fee-simple, out of which the lease for years did operate; then when the tenant pur auter vie surrenders, the discontinuance vanishes, and the estate-tail is restored; but the surrender being but upon condition, when the tenant for life enters for the condition broken, the discontinuance is revived.

(C) What Act or Thing shall make a Discontinuance in Respect of the Person to whom it is made

[1.] If tenant in tail enfeoffs the donor, this is not any discontinuance, because the donor hath the immediate estate. Co. Litt. S. 625. S. P. But this must be understood

1. Chudleigh 140.]

where the reversion of the donor is immediately expectant upon the estate of the donee; for if a man makes a gift in tail, the remainder in tail; reserving the reversion to himself; in this case if the donee enfeoffs the donee, this is a discontinuance, because this is a mean estate, and so does Littleton here put his case of a reversion immediately expectant upon the gift in tail. Also it is so intended of a feoffment made to the donor solely or only; for if the donee enfeoff the donor and a stranger, that is a discontinuance of the whole land. Co. Litt. 334 b. 335. a.

But if tenant for life makes a lease for his own life to the lessor, the remainder to the lessor and an stranger in fee, in this case so far as the limitation of the fee should work the wrong, it enures to the lessor as a surrender for the one moiety, and a forfeiture as to the remainder of the stranger; for he cannot give to the lessor that which he had before, and as to the remainder to the stranger, it is a forfeiture for this moiety, and when the lessor enters he shall take the benefit of it. Co. Litt. 335. a.

If tenant in tail enfeoffs him in the immediate reversion or remainder, this operates as a surrender, and therefore passes no more than it lawfully may pass, and consequently works no discontinuance; but if the feoffment were to the more remote reversioner, or to the immediate reversioner with any other, it is a discontinuance, because it cannot be interpreted to operate as a surrender. Gilb. Treat. of Ten. 115.

[2. If a copyholder in tail (admitting it may be intailed) surrenders to the lord to make his will and he regrants it to the copyholder, this is not any discontinuance, though a surrender to the use of a stranger should be admitted to make a discontinuance; for the surrender to the lord cannot make a discontinuance, inasmuch as he hath the reversion. Mich. 15 Jac. B. R. between Lee and Browne, upon evidence at the bar agreed and resolved per totam curiam.]

[3. If there be tenant in tail, the remainder in tail, and the tenant in tail enfeoffs him in reversion in fee, this is a discontinuance. Co. 1. Chudleigh 140.]

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Fol. 634.

4. Tenant

Discontinuance.

4. Tenant in tail *enfeoffs the donor and a stranger*, this is a discontinuance conditional (i. e.) if the stranger survives. Dy. 12. a. pl. 53. Trin. 28 H. 8.

(D) *Who may make a Discontinuance.* Not he that is not *seised by Force of the Intail.*

[1.] If there be *baron and feme tenants in tail*, and the *baron and feme tenants in special tail*, and the *baron aliens in fee*, this is a discontinuance of the tail, for he is seised of the whole entirely. Co. 8. Greenly 71. b. resolved.]

[2. But if the *baron be seised of land in the right of his wife in tail*, and *aliens in fee*, this is not any discontinuance of the tail, for he is not seised by force of the tail; (but Fitzh. Nat. 193. is, that the issue shall not have a *fur cui in vita*, because this writ is for estates at common law, but he shall have a *formedon*;) but it seems this is no proof that it is a discontinuance of the tail; for if he should not have a *formedon*, he should be without remedy. Co. Lit. 326.]

Cro. C. 320. pl. 2. S. C. adjudged accordingly.—Jo. 334. 325. S. C. adjudged accordingly.

[3. If land be given to *baron and feme*, and the heirs of the body of the baron, and the baron makes a *feoffment in fee*, this is a discontinuance, for the baron is seised by force of the tail, and so it shall be pleaded. Mich. 9 Car. B. R. between King and Edwards, per curiam, præter justice Jones, who doubted thereof; adjudged upon a special verdict. Intratur Trin. 7 Car. Rot. 992.]

Cro. C. 320. pl. 2. S. C. adjudged.—Jo. 324. S. C. adjudged.

[4. So if in the said case *baron and feme join in a feoffment and after also levy a fine to the feoffee*, yet this is a discontinuance of the tail, for this will be the feoffment of the baron; in the said case of Mich. 9 Car. between King and Edwards, B. R. adjudged; though the feme survived the baron, as it was found by the verdict.]

Mo. 281. pl. 434. Mich. 31 and 32. Eliz. C. B. in case of BATTY v.

[5. If there be *tenant for life*, the *remainder in tail*, and he in remainder enters upon the lessee, and disseises him, and makes a *feoffment over*, this is not any discontinuance, because he was not seised by force of the entail. Tr. 2 Ja. B. between Mogridge and White, adjudged.]

TREVILLION, the sixth point was, that if tenant in tail enters upon his lessee for life and makes feoffment, and the lessee re-enters; the court held that this is a discontinuance.

S. P. as to a feoffment made by the tenant in tail, and the lessee re-entered, the court took this to be a discontinuance. Mo. 281. the sixth point in the case of Batty v. Trevillion.

[6. If there be *lessee for years*, the *remainder in tail to J. S. and J. S. enters upon the lessee*, and makes a *lease for life or feoffment in fee*, this is a discontinuance, for he was seised by force of the entail at the time of the feoffment. Pasch. 11 Car. B. R. between Sir Kenelm Digby and Jorden, resolved and ruled per curiam, upon a trial at bar.]

7. *Grant of reversion by tenant in tail with warranty makes no discontinuance of the tail, if the reversion does not fall to the possession in the life of the grantor; Quod nota, warranty makes no discontinuance.* Br. Discontinuance, pl. 14. cites 36 Aff. 8.

8. *Tenant in tail makes a lease for twenty-one years, and afterwards makes a feoffment in fee, with a letter of attorney to make livery. The attorney enters and ousts the lessee and makes livery.* Dyer and Walth held, that it was a discontinuance; and they said, that it was adjudged in the Earl of WARWICK's case, that where a man made a lease for life, and afterwards made a feoffment in fee, and a letter of attorney to make livery, who ousted the lessee and made livery, that it was a good feoffment, and if the lessee for life re-entred, the reversion remains in the feoffee. Mo. 91. pl. 226. Pasch. 10 Eliz.

Mo. 282.
pl. 434.
Mich. 31 &
32 Eliz.
in case of
Batty v.
Trevillian
in C. B.
the sixth
point there
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to both
points here
—See D.

131. a. pl. 71. the different opinions of several as to the last point.

9. *B. Tenant for life joined with C. the remainder-man in tail in a fine sur concessit only which was to the said B. for life, &c.* The court held the taking of the fine by B. to be a surrender of her estate, and the taking a new estate of the grant of C. in remainder to be no discontinuance, because he was not seised of the tail at the time. Mo. 747. pl. 1026. Trin. 26 Eliz. in the Court of Wards. Ld. Rolfe v. the Earl of Rutland.

10. In many cases a warranty added to a conveyance, is said to make a discontinuance *ab effectu*, although he that made the conveyance was never seised by force of the estate tail, because it takes away the entry of him, that right has, as a discontinuance does. *As if tenant in tail be disseised and dies, and the issue in tail releases to the disseisor with warranty, in this case the issue was never seised by force of the tail, and yet this has the effect of a discontinuance by reason of the warranty.* Co. Litt. 339. a.

11. *If tenant in tail makes a lease for term of life and the tenant in tail has issue and dies, and the reversion descends to his issue, and after the issue grants the reversion, to him descended, to another in fee, and the tenant for life attorns and dies, and the grantee of the reversion enters, &c. and is seised in fee in the life of the issue and after the issue in tail has issue a son and dies, it seems that this is no discontinuance to the son, but that the son may enter, &c. for that his father, to whom the reversion of the fee-simple descended, had never any thing in the land by force of the entail, &c.* Litt. S. 638.

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tail, the entry of his issue was congeable. Br. Entre Cong. pl. 71. cites 34 Aff. 4.

The issue in tail had no inheritable possession, inasmuch as the right of entail only descended on him, and not the possession; and therefore he could not have any power to alien a right of possession that was never in him; and consequently his grant when he never had any original right of possession by virtue of such entail does not discontinue the right of possession, so as to bar the son from his entry. Gilb. Treat of Ten. 117.

So if tenant in tail makes a lease for life, and then grants over the reversion, and the tenant for life attorns, and then the grantee grants over, and the tenant attorns to the second grantee, and dies, and the second grantee enters in the life tenant in tail, and then the tenant in tail dies, this is no discontinuance to bar the issue, but that he may enter; because, though the tenant in tail had an original right to discontinue during his life, because he had the right of possession in him, yet the first grantee had no right

right of possession in him; nor ever was seised of the land by virtue of the entail, or otherwise; and since he never had the right of possession in him, he cannot alien the right of possession; so as to work a discontinuance. Gilb. Treat. of Ten. 117.

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12. *None can discontinue an estate tail, &c. unless he once were seised by force of the tail, &c. unless it be in respect of a warranty;* which being made to a feoffee, or disseisor and descending to the heir, had the effect of a discontinuance in taking away the entry of the heir before 4 & 5 Ann. cap. 16. by which all warranties made by them who have no estate of inheritance in the land, &c. shall be void against the heir. And where no greater estate passes than for life of tenant in tail, as in grants of reversions, &c. a warranty added, whether by tenant in tail or any other ancestor, never caused any discontinuance. Hawk. Co. Litt. 430.

13. *But such feoffments and grants made by them, who never were seised by force of such estates, are good against the grantors during their lives.* Hawk. Co. Litt. 430.

If tenant in tail grant all his estate in fee, and gives livery thereon, this works no discontinuance, because he has an estate for the purpose of alienation but for term of his life. Gilb. Treat. of Ten. 112.

14. *None may discontinue the remainder or reversion of an estate tail, but he only to whom the land is entailed, and therefore if tenant in tail grants totum statum suum to another, and he makes a feoffment in fee; this shall not take away the entry of him in remainder or reversion.* 10 Rep. 97. Mich. 10 Jac. in Seymour's case.

If a man has the right of possession, and is not possessed by virtue of the entail, there cannot work a discontinuance, unless by warranty; as if there be grandfather, father and son, and the grandfather is seised in tail and the father disseises the grandfather, and makes a feoffment in fee, and dies, this works no discontinuance, because the father was not possessed of the entail, but of a fee-simple by disseisin, which was subject to the entry of the tenant in tail, and consequently the alienation is subject to the entry of the issue in tail, inasmuch as the father, that made the alienation, had only the naked possession by the disseisin, and not the right of possession by virtue of the entail; but if the father had enfeoffed with warranty, this had been a bar, because the heirs in that case had been bound by contract to defend that possession, and therefore had been ever afterwards repelled from claiming it, if it asserts descended. Gilb. Treat. of Ten. 118.

15. *But if the tenant in tail were but once seised of the tail, though not seised at the time when the discontinuance of the whole estate is begun, it is sufficient to create a discontinuance; but though the tenant was never seised, yet there may be a discontinuance by reason of a warranty, as if the father disseises the grandfather, being tenant in tail, and the father makes a feoffment with warranty, and then the grandfather and father die, this is a discontinuance to the son, Litt. S. 637, 638. Otherwise not because the father was never seised of the estate tail.*

Raym 36. Stevens v. Brittredege. S. C. It seemed to the court that the estate is executed, and doth not differ from Bre-

16. *Tenant for life, the remainder to the wife for life, the remainder to the heirs of their bodies; they levy a fine with warranty to B. the baron and feme die without issue; the next person in remainder (being a daughter by a former venter) brings an ejectment. The baron here has but an estate for life; and there is no displacing and divesting of any remainder but the fine operates only as a grant of cefuy pur vie, and the remainder in tail which they may lawfully grant, and does not disturb any estate in remainder; and if there*

were any displacing of the estate, yet it is but at the election of him in remainder as if he will bring his formedon, and admit himself out of possession. But if there be no discontinuance, the warranty will be no bar, as in Seymour's case. 1 Lev. 36, 37. Trin. 13 Car. 2. B. R. Stephens v. Brittridge.

don's case.
Sed adjor-
natur. —
Sid. 83.
pl. 20. S. C.
resolved
per Cur.

that it is no bar; and that the estate tail in the baron and feme was not executed because there was an intervening remainder limited to the wife, which is an impediment, the which estate is not drowned, but remains distinct, inasmuch as they take by undivided moieties. But it was agreed by all, that if the estate tail had been executed, the fine had been a discontinuance of the remainder in tail, and the warranty had barred.

17. Tenant in tail has the right of possession inheritable, and therefore he may *discontinue* the same in fee by his feoffment, because since he has an inheritable possession, it follows of consequence, that he may alien it without any disseisin to any person; but if he only makes a lease for life, he executes but part of his power; for since he had a possession inheritable, he from that possession has privilege to alien in fee without disseisin to any one; and therefore if after such lease for life, he grants the reversion in fee, and tenant for life attorns, and after tenant for life dies, and the grantee of the reversion enters in the life of tenant in tail, this is a discontinuance of the fee; for since he had originally an inheritable possession, this is an execution of the farther remaining part of his power, and amounts to an alienation of the fee by a second feoffment; for having originally an inheritable possession, he might discontinue the same in fee; and when he executes but part of his power, the rest remains in him; and therefore if he have afterwards opportunity in his life he may execute it by a second alienation. Gilb. Treat. of Ten. 116.

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18. If tenant in tail makes a lease for life, and dies, and the reversion descends to the issue, and the issue grants the reversion with warranty, and tenant for life attorns, and dies, and the grantee enters, and the issue dies leaving a son; this is no discontinuance, but the son may enter; for he is not barred by this warranty; for the issue in this case only transfers the reversion, and not the possession, or right of possession; and therefore issue in this case is not repelled from claiming the possession, which was never transferred to the grantee, and to which the warranty was never annexed; for it were absurd to construe the warranty to extend to the possession of that which never was in possession at the time when the contract was made. Gilb. Treat. of Ten. 118, 119.

(D. 2) What is an Impediment to it.

1. **I**N assise. If a man seised in jure uxoris leases the land to B. for life, and after grants the reversion to S. in fee, and dies, and after B. dies, the entry of the feme is lawful, for there was no discontinuance but for the life of B. for the reversion in fee is not discontinued, because the baron died before the tenant for life, so that the reversion was not executed in his life. Br. Discont. de Possession, pl. 15. cites 38 Aff. 6.

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2. A

Held upon evidence by Hill. 28 Car. 2. B. R. in case of Pigot v. Salisbury; cites Co. Coke Ch. J. Litt. 332. that where tenant was for life on condition on such act done to have for years, and lessee did the act by which he became tenant for years, and after he in remainder levied a fine, he thought this was discontinuance, being levied after he was lessee for years, but it had been otherwise had it been during the time of his being lessee for life. Roll. R. 188. pl. 21. Pasch. 13 Jac. B. R. Sir George Reynell.

3. *Reversioner in tail expectant on estate for life made a feoffment by consent of tenant for life*; this is no discontinuance of the remainder over; for it is a maxim in law, that *he that has no freehold in the land, cannot discontinue any estates therein*; and a naked assent of tenant for life to the making the feoffment did not amount to a surrender of the estate to the reversioner. Carth. 110. Hill. 2 W. & M. in B. R. Swift v. Heath.

[535] (E) Of what Things it may be.

[1. A Discontinuance may be of a *copyhold in tail* (admitting this to be a tail) as by a recovery in a real action in the court of the lord. Co. 4. Deale 23. (But note, that this is more properly a bar for the time than a discontinuance, as it seems to me.) Mich. 43, 44 Eliz. B. R. per Curiam. Morris's case, Hill. 8 Jac. B.]

[2. If *baron and feme* are *seised* of lands in the right of the *feme*, and *lease it to another for life*, this is not any discontinuance, for this is the lease of the *feme* till disagreement. Contra 18 Ed. 3. 39. 54. 18 Aff. pl. 2.]

3. Rent cannot be discontinued. Br. Formedon, pl. 65. cites 33 E. 3.

4. In *entry sur disseisin* they were at issue, and after came the tenant, and pleaded confirmation of the demandant made to him after the last continuance, not the deed after the last continuance is no plea; for if it was his deed before it is a bar; for it is so confessed in effect, nor he shall not say that it was delivered before and not after, but may say that it was made before the last continuance by *duress*, *absque hoc* that it was made after the last continuance. Br. Faits, pl. 90. cites 21 H. 6. 9.

5. If *tenant in tail of a rent grants it in fee*, this is no discontinuance; for it is by grant without livery, which is only his interest which he may lawfully grant. Br. Discont. de Possession, pl. 3. cites 21 H. 6. 52. and 41 Aff. 48.

6. Rent in *gross* lies not in discontinuance, but rent parcel of a manor may be discontinued by feoffment of the manor. Br. Discont. de Possession, pl. 36. cites 21 H. 7. 34.

7. If *A. is tenant in tail, remainder to B. for years, remainder in fee to A.* Afterwards *B. conveys his estate to the king, and A. makes a feoffment*, this is a discontinuance, notwithstanding the term which

which is in the king; for he by this term has not any possession in the land. 2 And. 210. pl. 29. in the Court of Wards in Clyve's case.

8. *Tenant in tail remainder to the king levies a fine*, with proclamations. It was holden it shall bind the issue, notwithstanding the saving in the statute 32 H. 8. for that here is not any reversion in the king, but a remainder, of which the statute speaks nothing; but yet this fine does not divest the remainder out of the king, but the donee shall have a fee determinable upon the tail. Mo. 115. pl. 258. Pasch. 20 Eliz. Jackson v. Darcey.

9. *A. makes a gift in tail to B. who makes a gift in tail to C. C. makes a feoffment in fee, and dies without issue. B. has issue and dies. The issue of B. shall enter*; for although the feoffment of C. did discontinue the reversion of the fee simple, which B. had gained upon the estate tail made to C. yet it could not discontinue the right of the entail which B. had, which was discontinued before; and therefore *when C. died without issue, then did the discontinuance of the estate tail of B. which passed by his livery, cease*, and consequently the entry of the issue of B. lawful; which case may open the reason of many other cases. Co. Litt. 327. b.

10. *A grant by deed of such things as do lie in grant and not in livery of seisin, works no discontinuance. But the particular reason is, for that of such things the grant of tenant in tail works no wrong, either to the issue in tail, or to him in reversion or remainder; for nothing does pass but only during the life of tenant in tail, which is lawful, and every discontinuance works a wrong.* Co. Litt. 332. a.

11. *If tenant in tail of a rent service, &c. or of a reversion or remainder in tail, &c. grants the same in fee with warranty, and leaves assets in fee simple, and dies; this is neither bar nor discontinuance to the issue in tail, but he may distrain for the rent or service, or enter into the land after the decease of tenant for life. But if the issue brings a formedon in the descender; and admits himself out of possession, then he shall be barred by the warranty and assets.* Co. Litt. 332. b.

Br. Discont.
of Poss. pl.
9. S. P. cites
21 H. 7. 9.
—Ibid. pl.
34. S. P.
cites 21 H.
7. 40.

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(F) Discontinuance.

Of what Estate or Interest.

1. **I**F a man be seised of a manor with an advowson appendant in tail and dies, his heir enters and endows his mother of the third part of the manor, and of the third part of the advowson to present by turn and after takes feme, and conveyed two parts of the manor, and the reversion of the third part and of the advowson in demesne and in reversion in fee, and re-takes an estate to him and his feme for their lives, the heir cannot discontinue the third part of the manor, nor the third part of the advowson in the life of the tenant in dower, because it remains in reversion, and therefore his grant of it shall

not serve but for his life. And if he grants two acres of the manor, and the advowson to *W. N.* in fee after that he has presented twice, and after he and the tenant in dower die, and the church is void, his feme shall have the presentation, and not the alienee, because it is but a grant of it, and not a discontinuance, and the grant is not good, for the baron is dead. *Quod nota by award.* Br. Discon. de Poss. pl. 10. cites 23 Aff. 8.

2. If tenant in tail endows his mother and after grants the reversion, and the tenant attorns, this is no discontinuance, per Hufsey, Brian, and Fairfax. And if tenant in tail of a rent in possession makes alienation with warranty, and the tenant attorns, it is a discontinuance. Br. Discont. de Poss. pl. 19. cites 4 H. 7. 17.

For more of Discontinuance in general, see **Baron and Feme, Qui in Vita. Fine. Formedon. Jointress. Perpetuity. Recovery Common. Remainder.** And other proper Titles.

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Discovery.

See (C) pl.
6. (D) pl.
44

(A.) Bill of Discovery. Good. In what Cases in General.

1. **D**EFENDANT enforced to set down upon his oath whether his lease was expired or not. 25 Eliz. Toth. 69.

2. Where the complainant will rest upon the oath of the defendant, and be contented to be judged thereby, there the oath of bewraying is hardly granted. Cary's Rep. 15.

3. A bill was brought for tithes of conies due to him by custom, to pay the tenth coney or the value of it, and to discover how many he had killed. The defendant, by answer denied the custom, but made no discovery as to the number killed, or the value of them. Exception being taken thereto, the court held, that he need not discover, there being a full answer given to the thing in demand, by denying the custom; which should be tried before he be bound to discover, but the court thought fit that if this matter should be found against the defendant, he should be examined upon interrogatories to discover his knowledge, and an issue was directed to try the custom. And the court conceived the case stronger for the defendant, the demand
of

of tithes of conies *being against common right.* Hard. 188. Pasch. 13 Car. 2. in the Exchequer. *Randall v. Head.*

4. And the court held that it would be the same if the plaintiff upon a feigned suggestion should pray that a defendant *discover what writings he has or what goods or other things upon a pretence that he is jointenant with him*, and so as to what he has got by his trade, which would be strangely inconvenient; but where that is no such great inconvenience, as upon a bill against an executor to discover assets upon a bond or debt, there he must answer though he denies the debt; because it concerns the act of another person, and assets are presumed, and in such case there is no inconvenience. Hardr. 188. Pasch. 13 Car. 2. in the case of *Randal v. Head.*

5. A. seised of lands in fee *covenants by deed in consideration of 1500*l.* to settle all his lands of which he was then seised, so that on A's death they should come to B. and his heirs, and also to leave B. all his personal estate (except, &c.) and also that all the lands which he should purchase after per date of the said deed, should be so purchased that after A's death they should come to B.* A. by a former decree was ordered to convey the lands he was seised of at the time of the deed executed. And having purchased lands since B. brought a new bill for discovery of the same. B. *demurred*, for that the plaintiff hath *not entitled himself thereto*, and the demurrer allowed. Fin. R. 230. Trin. 27 Car. 2. *Coke v. Bishop and Verdon.*

6. Where the entail was *discontinued by feoffment* the court would not oblige the defendant to *discover where the freehold was* to enable the plaintiff to find out a tenant to the præcipe, against whom to bring his *formedon*. 2 Vern. 345. pl. 318. Hill. 1697. in case of *Bowater v. Ely*, cites it as the case of *Sharrard v. Stapleton*. Vern. 212. pl. 210. Hill. 35 & 36 Car. 2. *Stapleton v. Sherrard.*

7. Plaintiff not entitled to discovery *without verifying his title at law*. MS. Tab. 1713. *D. Hamilton v. Fleetwood.*

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8. Whether a *plea of the statute of limitations* be a bar to a discovery, and whether the point of the plea ought not to be considered first. MS. Tab. Dec. 12, 1721. *Earl of Broadalbine v. Earl of Cathness.*

9. Chancery never allows a bill of discovery *in aid of the ecclesiastical jurisdiction*; per *Ld. Hardwick*. Mich. 1738. *Dun v. Baluey.*

(B) Bill of Discovery allowable in what Cases.

Where it will subject a Man to Penalty or Forfeiture.

1. **T**HE plaintiffs exhibited a frivolous bill without a counselor's hand, and got an injunction for stay of any suit to be commenced in any of her majesty's courts but in this; which *subpoena and injunction* being served, seemed to be counterfeit; therefore ordered a subpoena be awarded against the plaintiffs as well to

show of whom they had the said writ, and to answer their misdemeanors, as also to pay the defendant costs for his unjust vexation. Cary's Rep. 152, 153. cites 21 Eliz. Ap. Edward ap Hugh, and David ap Jenkin v. Ralph Jenkin.

2. M. was not enforced by answer to discover a *forfeiture* to his own hurt. Toth. 69. 32 and 33 Eliz.

Defendant
not com-
pelled to
disclose
matter of
usury. Toth.
135. cites
22 Eliz. Fenton v. Blomer.

3. The plaintiff prefers his bill to have the defendant's answer, *whether the contract was to receive more monies for interest than was warranted*; demurrer unto, but over-ruled, and if found that the defendant lent it without consideration, then to take the forfeiture. Toth. 87. 25 Eliz. Cotton v. Foster.

4. One who had a *covenant to deliver evidences*, exhibited his bill, supposing certain deeds to remain in the covenantor's hands; the opinion of the court was, the defendant needed not to answer, because he should thereby disclose cause of forfeiture of the bond. Toth. 80. Mich. 38 Eliz. Wolgrove v. Coc.

5. A bill *upon a penal statute*, claiming one half to the queen and another to the party disallowed by my lord's opinion, though not mentioned in the order. Toth. 80. Trin. 39 Eliz. Coward v. West.

6. The Countess of Mountague claimed the *wardship of the body* of the heir of a tenant of hers, which was esloyned from her; she, suspecting some of the heir's friends exhibited her bill in chancery; and it seemed they should *not answer to charge themselves criminally*, especially in this case, where so great a punishment as *abjuration* may follow, &c. Cary's Rep. 12, 13.

7. Defendant ordered to answer, though it be *to his prejudice by statute laws*. Toth. 74. Trin. or Mich. 4 Car. Eland v. Cottingham.

8. Although *criminal causes* are not here to be tried directly for the punishing of them, yet incidently for so much as concerneth the equity of the cause they are to be answered. Toth. 74. Wakeman v. Smith.

9. A *commissioner* to answer *bribery* and corruption. Toth. 74. Trin. 6 Car. Winn v. Swain.

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This seems
to be mis-

printed for 11 Geo. and was a bill brought against a copyholder for a discovery of timber cut down more than he could justify. The defendant demurred, because it would subject him to a forfeiture, as being waste, and the demurrer was allowed. MS. Rep.

10. On a demurrer to discover what waste he had done, the demurrer was allowed. Arg. Comyns's Rep. 664. cites 11 Car. Attorney General v. Vincent.

11. Bill *by the Attorney General against a person outlawed to discover his real and personal estate, and what secret and fraudulent gifts and conveyances* he had made, for that he was outlawed, whereby his goods and profits of his lands were forfeited. Defendant demurred, *Quia nemo tenetur prodere seipsum*, and to discover his estate upon a forfeiture, but held that he must answer, because the protector is intitled to his estate by course of law, and the outlawry is in nature of a gift to the king or a judgment, and a *common person* may have

have a bill of discovery in the like case to enable him to take out execution, and he was ruled to answer; Quod nota. Hard. 22. pl. 6. Mich. 1655. in Scacc. The Protector v. Lord Lumley.

12. A bill was to discover, *Whether the defendant did not conceal the customs and excise upon 260 casks of currants imported, and had endeavoured to corrupt the custom-house officers by promising 40l. reward to conceal it.* On demurrer by the defendant the court inclined to think he should not be compelled to make a discovery, unless the Attorney General waived the proceeding for all forfeitures. Arg. Comyns's Rep. 664. cites Hard. 137, 138. [Hill. 1658. in Scacc.] The Attorney General v. Mico.

13. The difference is between causes criminal and civil; if an offender be once legally convicted of an offence, whereby he ought to forfeit his estate, then it is lawful and proper to prefer a bill to discover what estate in lands and goods he then had, as in case of an outlawry or attainder, &c. for that the effect of such a bill is not only to discover what is forfeited already, and not to discover a cause of forfeiture. Arg. Hard. 145. in the S. C.

14. Defendant shall not discover any thing against himself to charge himself with the penalty of a bond of arbitration. Chan. Rep. 142. 15 Car. 1. Bishop v. Bishop.

15. The husband devised to his wife an estate and interest in several goods and things to be held and enjoyed by her during her widowhood. On a bill brought against her to discover, *Whether married or not*, in order to prove a forfeiture of her estate, she demurred, and the bill was dismissed. 2 Chan. Rep. 68. 24 Car. 2. Monnings v. Monnings.

S. C. cited
Comyns's
Rep. 664.
Pasch. 12
Geo. 2.

16. A man is not bound to discover what may subject him to the penalty of an act of parliament. Vern. 109. pl. 98. Mich. 1682. Bird v. Hardwick.

Or to forfeiture of his freehold. 2 Salk. 550.

Sir Basil Firebrass's case.——But where it is by his own agreement, though it is a penalty, he must discover. 2 Vern. 244. pl. 229. Mich. 1691. African Company v. Paris.——Or where the person requiring it has the power, and offers to remit such penalty. And this is the constant rule in cases of tenant for life committing waste, or levying a fine, &c. or any other forfeiture, unless the forfeiture is remitted he is not bound to discover. See G. Equ. R. 187. Arg. Hill. 12 Geo. 1. in case of Gascoign v. Sidwell.

* India Company v. Blake. Fin. R. 117. S. P.

† As whether he agreed to give a counsellor a sum in gross for care and pains. For it is within the statute of maintenance. Fin. R. 75. Hill. 25 Car. 2. Penrice v. Parker.

17. Bill for tithes; defendant demurred because he had not offered by his bill to accept of the single value, and yet alleged in his bill that the defendant had carried away the corn, &c. without setting forth the tithes according to the statute; it was urged for the defendant, that should he answer, the plaintiff would presently go to law, and give his answer in evidence, and recover the treble value of the tithes, and a court of equity ought not to assist in recovering a penalty, nor compel a discovery of a forfeiture; but over-ruled, the plaintiff in this case being only executor of a parson, and not the parson himself, and so not intitled to a forfeiture on the statute. Vern. 60. pl. 57. Mich. 1682. Anon.

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17. Bill was brought to discover felony; defendants demurred, and the demurrer was allowed. Ch. Prec. 214. pl. 176. Hill. 1702. Attorney-General for Hindley v. Sudell, Hesketh, & al'.

18. A bill was brought at the relation of several *freemen of the Weavers Company against the defendants, Wardens, &c.* of the said company, setting forth their *charters* of incorporation and rules, but that the defendants had been guilty of many breaches thereof, and had oppressed the freemen, &c. and mentioned some particulars, and for a discovery of the rest, and *that they might be decreed for the future to observe the charters, and to have an account of the revenue of the corporation, which the defendants had mispent, &c.* was the end of the bill; to which the defendants demurred, because as to part of the bill it was to subject them to prosecutions at law, and to a quo warranto, and as to the other parts, the plaintiffs had remedy by *mandamus, information, or otherwise, and nothere*; and of the same opinion was my Lord Keeper, who said it *would usurp too much on the King's Bench, and that he never heard of any precedent for such a case as this*, and so allowed the demurrer. Abr. Equ. Cases 131. Mich. 1705. Attorney-General v. Reynolds, & al'.

19. If A. *steals goods* from B. and sells them to C. and A. takes them from C. the *vendee*, C. may sue A. in equity to discover his title to those goods, and A. shall be enforced to answer. Holt's Rep. 50. pl. 6. Mich. 5 Ann, in case of Gawne v. Grandee.

20. Where several are *partners in an unlawful or clandestine trade*, and one of them brings a bill of discovery against the others, it is no good plea that their answer may subject them to the penalty of an act of parliament; for by their going on in such trade they seemed to have entirely waived that unlawfulness as *between themselves*; so the plea was disallowed, and they were ordered to answer. G. Equ. R. 186. Hill. 12 Geo. 1. Gafcoyne v. Sidwell.

21. Upon the marriage of Mr. Payne with one Mrs. Gage, *lands in the county of Surry were settled and conveyed to the use of the husband and wife for their lives, and the life of the survivor of them, then to the use of the first and every other son in tail male, remainder to the right heirs of the husband.* The marriage took effect, but Mr. Payne, the husband, died in the life-time of his wife without leaving any issue, having devised all his lands to his wife and her heirs.

In 1730 Mrs. Payne, the wife, devised all her real estate to the defendant, subject to a few legacies mentioned in her will, but lived and died a papist; but that being difficult to prove at law the plaintiff Mr. Smith, who had married Eliz. Payne, heir at law to Mr. Payne and his wife, filed their bill against the defendant to set aside the marriage-settlement and will of Mr. Payne, the husband, under which Mrs. Payne claimed, and in particular prayed that the defendant might discover whether Mrs. Payne, the wife, under whom the defendant claimed, was a papist or not.

As to so much of the said bill as sought a discovery from the defendant whether Mrs. Payne was at any time, and how long before her marriage with her husband, a papist, and professed the popish religion, and continued so till her death, and whether as such she was

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MS. Rep.
March 19.
1736.

Smith v.

Read.—

S. C. cited

Comyn's

Rep. 665,

as deter-

mined by

Lord C.

Hardwick,

that the de-

fendant

was not

obliged to

discover

by answer,

whether he

be a papist

or not; in

that case on

marriage of

Mrs. Payne

with Mr.

Smith, a

settlement

was made to

the use of

husband and

wife for

their lives,

or

or any interest or profits whatsoever out of lands; the defendant pleaded the deeds of settlement made upon the marriage of Mr. Payne and his wife, as; also the will of Mr. Payne, the husband, under which she claimed, as also the will of Mrs. Payne, under which the defendant claimed; and for plea further saith, that by an act of parliament made in the 11th and 12th year of his Majesty King William the 3d, it was amongst other things enacted, that every papist or person making profession of the popish religion should be disabled, and was thereby made incapable to purchase either in his or her own name, or in the name of any other person or persons to his or her use, or in trust for him or her, any manors, &c. and that all and singular estates, terms, and any other interest or profits whatsoever out of lands to be made, suffered or done to and for the use or behoof of any such person or persons, should be utterly void to all intents and purposes.

Upon arguing this plea it was insisted upon for the defendant, that it was a standing rule in this court, that no person was bound to discover what might subject him to the penalty of an act of parliament. That the statute 11 and 12 Wm. 3. was a penal law, and that the party who would take advantage of such a law, ought not to be assisted in a court of equity, which never helps a forfeiture. He that would claim any thing forfeited, must make out the forfeiture himself; for no person is obliged to discover a fact, which fact would be a forfeiture of his own estate. *If a copyholder commits waste, it is a forfeiture of his own estate to the lord of the manor; but if the lord of a manor comes into this court for a discovery whether the copyholder has been guilty of waste or not, the copyholder is not bound to answer; for no law in the world obliges a man to accuse himself. If an estate is given to a woman durante viduitate sua, she is not bound to discover whether she is married or not, because the discovery of that fact might be the loss of her estate.* 2 Chan. Rep. 68. which case they affirmed to be law.

That *disabilities and forfeitures were of the same nature*; that a total incapacity or disability to hold at all (which is the case of papists) was certainly as much a penalty as a forfeiture of an estate which the party was before capable of holding. That as Mrs. Payne would not have been obliged in her life-time to discover whether she was a papist or not, so the defendant who claims under her will not be obliged to discover it because he stands in her place. To all which might be added that this and other acts of parliaments made against papists creating disabilities and penalties were hard laws made to restrain people in the exercise of their religion according to their conscience, and therefore would never be helped in a court of conscience as this court was.

On the other hand it was insisted for the plaintiff, that it was not their business to examine whether the acts of parliaments made against papists were hard laws or not; they were laws, and that was sufficient for their purpose; that this was not the case of a forfeiture, but it was to discover a fact, which if true, the estate was never in Mrs. Payne, because the act of parliament makes all papists absolutely incapable of being purchasers; if she was a papist, the estate

and after to the first and other sons of that marriage in tail, remainder to Mrs. Pain in fee, who devised it to the defendant; and the bill was to discover if the deviser was not a papist, in which case the devise would be void; and on plea to this bill, Lord Chancellor held, that defendant was not obliged to answer.

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tate never vested in her, and as she was not capable of holding it, she could not give it away to the defendant, the defendant therefore could never forfeit the estate; for no person could be said to forfeit an estate he never had. An alien is incapable of holding lands at the common law, but it is clear that he would be obliged to discover whether he is an alien or not, and his discovery of that fact whether he is so or not, can never be a forfeiture of his estate, because he never had a right to it. So in case of a bastard who is nullius filius, and incapable of claiming lands by descent, he shall discover whether he be so or not for the same reason. So a person claiming under a bankrupt whose goods are vested in the assignees for the benefit of the creditors, must discover whether the person under whom he claims was a bankrupt or not at the time of the conveyance. That all these cases depend on the same reason, and were no forfeitures, because the estates were never in them. So if Mrs. Payne was a papist, she was incapable of having the estate herself, so could not give it away, and therefore the defendant could never forfeit it, because the estate was never in him.

But my Lord Hardwicke was of opinion, that the defendant was not obliged to discover whether Mrs. Payne was a papist or not; that there was no rule better established in this court, than that a man shall not be obliged to answer to what may subject him to the penalty of an act of parliament. No person can doubt whether this be a penal law, and whether the clauses relating to papists are not penalties imposed on all persons exercising that religion. It is objected that this is not the case of a forfeiture, because the estate was never vested, and therefore can never be divested; yet it all falls under the same reason, and an incapacity or disability to hold at all created by act of parliament is certainly as much a penalty as the forfeiture of an estate by a person who had a right to enjoy it before that forfeiture. That this is *not like the case of an alien or bastard*, who are incapable by the general laws of the realm to inherit; for this is a disability created by an act of parliament. That what swayed with him much was the great inconvenience that would follow, should this plea be disallowed, for that there would be nothing in this court but bills of discovery whether such and such persons were papists or not, and nobody knows what confusion would follow.

His lordship held, that as Mrs. Payne was not obliged to discover whether she was a papist or not, so likewise the defendant who claimed under her was not, and that in that respect there was no difference between the party herself and the person who derived his title from her. The plea was allowed.

22. Giles Meredith being seized of the lands in question in fee, died leaving three sisters, all of them above the age of eighteen years and six months and professing the popish religion, viz. the defendants Catherine Cecily and Mary who was married to the defendant Watkins who was a protestant.

And now the plaintiffs brought their bill in right of the plaintiff Mary who was the next protestant kin (setting forth their case as above) against the said defendants Catherine Cecily and Watkins and his wife in order to compel them to discover *whether at the death*

death of the said Giles Meredith they were not severally of the age of eighteen years and six months and upwards, and were not educated in and professed the popish religion, and whether they had not refused to take the oaths prescribed by the act of the 11 & 12 W. 3. and thereby incapacitated from holding any lands, &c. by descent or otherwise, and whether plaintiff Mary is not next of kin to the late father of the said Giles Meredith, and to the said Giles Meredith, as also to the said defendants Catherine, Cecily, and Mary, and thereby, and by the said act intituled to the premisses during such incapacity.

To such parts of the said bill as sought a discovery, whether the said defendants were not educated in, and did not then, and at the filing the bill profess the popish religion, and whether they were not at the death of Giles Meredith of the age of eighteen years six months and upwards, or what other ages, and whether they had not incurred the penalties of the said act, and were incapable of holding and enjoying lands, &c. by descent or otherwise, and whether the plaintiff Mary was not next protestant of kin to the father of the said Giles Meredith and of the said Giles Meredith and also to these defendants, and thereby entitled to enjoy all the said lands during the supposed incapacity of those defendants, the defendants pleaded the said statute of the 11 & 12 W. 3. intituled An Act for the further preventing the Growth of Popery, in regard that such discovery might subject them to the penalties, forfeitures, or disabilities of the said act.

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The plea was allowed. Comyns's Rep. 661. Pasch. 12 Geo. 2. in Scacc. Jones & Ux. v. Meredith & al'.

(C) Bill of Discovery after Verdict or Judgment.

1. **I**N an action on the case a verdict passes against the plaintiff for want of being able to prove a letter wrote to him by the defendant, the plaintiff brings a bill to clear up this matter; defendant pleads *the verdict*, and that the effect of the letter was given in evidence at the trial, and *demurred for want of equity*, and plea and demurrer allowed. Chan. Cases 65. Hill. 16 and 17 Car. 2. Sewell v. Freestone.

2. Money was paid in part of an account for goods, but the receipts were lost, and so the whole was recovered at law. Per North K. You come too late for a discovery *after a verdict*. Vern. 176. pl. 169. Trin. 1683. Barebone v. Brent.

3. A. having recovered judgment at law for 1400*l.* against J. S. brings a bill charging that J. S. had conveyed his estate to trustees, and had lent 1000*l.* to B. in C's name, and praying that this might be liable to A's debt; defendant demurred, for that he in his lifetime is not bound to discover his personal estate; and demurrer over-ruled, Vern. 398. pl. 370. Pasch. 1686. Smithier v. Lewis.

4. A. obtains a judgment against B. and brings a bill against C. for an account and discovery of goods of B. which C. had got into his hands; defendant demurred, because the plaintiff had *not alleged that*

that be had taken out execution, and demurrer allowed. Vern. 399. pl. 371. Pasch. 1686. Angel v. Draper.

5. The plaintiff having recovered judgment against J. S. (but no writ of execution sued out) supposing some *particular effects* of J. S.'s to be in the defendant's hands, brought a bill to discover them, in order to *subject them to his judgment*; the defendant demurs, because there is no equity to compel a discovery, and no such bill would lie against the debtor himself, much less against a third person. My Lord Keeper seemed to agree it would *not lie against the debtor himself, nor to have a general discovery from a third person, but only for particular things*, as this bill was, and over-ruled the demurrer. Abr. Equ. Cases 132. Mich. 1705. Taylor v. Hill.

This should have been entered at (A).

6. Bill for the discovery of the consideration of a promissory note for 275 l. suggesting that it was given *ex turpi causa*, to smother and make up a felony, &c. demurrer to that part of the bill which seeks a discovery if the note were not given to make up a felony which is of a criminal nature, &c. and the demurrer allowed. MS. Rep. Mich. 4 Geo. in Canc. Guiborn v. Fellows & al'.

[544] (D) Bill of Discovery against Purchasors.

1. **T**HE plaintiff bought land of one who had no power to sell, and moved that if the defendant should be compelled to bring in the leases which might incumber the plaintiff's purchase, then the plaintiff might bring in the ancient evidences which might discover, that he which sold to the plaintiff had no power to sell; the court answered, that no aid should be given to overthrow purchases made bona fide. Toth. 223. cites Vavafor or Waserer v. Row, in 33 & 34 Eliz.

So, of a de-
vise. 3 Ch.
R. 32. Bo-
rington v.
Borington.

2. A purchaser of lands from A. which B. makes title to, getting the deeds which makes out B's title, is not bound to discover them. Ch. Cases 69. Pasch. 17 Car 2. Shirly v. Fagg.

N. Ch. R.
135. S. C.
per Bridg-
man K.—
Fin. R. 102.
per Finch
K. the
S. C. but D. P.

— Ch. Cases, 4. 1679. Anon. contra.

3. Pleading a man's self a purchaser for a valuable consideration is not good unless he pleads it from some of the plaintiff's ancestors; for a purchase from a stranger without title was held no good plea; for the defendant was ordered to answer. 3 Ch. R. 40. Hill. & Mich. 1669 & 1670. Seymour v. Nofworthy.

4. A bill of discovery was brought against a purchaser on a valuable consideration, and the court would not compel him to answer, though it was proved there was a deed and a real settlement; cited per Serjeant Maynard. Vent. 198. Pasch. 24 Car. 2. B. R. in the case of Jones v. the Countess of Manchester.

5. Bill for the discovery of a title by a coheir in gavelkind; defendant pleaded that he is a purchaser for a valuable consideration without notice, and that he had obtained a verdict and judgment in ejection;

ejection; the court allowed the plea. Fin. R. 34. Mich. 25 Car.

2. Hayman v. Gomeldon.

6. Bill brought to set aside a purchase, and to have a discovery of the site and profits of the estate. Defendant by answer insists that he is a purchaser, and that he is not obliged to make a discovery; to which exception was taken for not answering, and that exception allowed. Sel. Cases in Canc. in Lord King's time, 51. Mich. 11 Geo. 1. Richardson v. Mitchell.

In support of the exception was cited the case of STEPHENS v. STEPHENS before Lord

Macclesfield; bill was brought for a discovery of the rents and profits of an estate, which he claimed by will from a common ancestor; defendant says he is intitled to the estate, and therefore till the right is determined, he was not obliged to give account of rents and profits. Lord Macclesfield said, this might have been good by way of plea, but having answered, he must answer the charge of the bill. Ibid.

So lately the case of EDWARDS v. FREEMAN; bill brought for account, the defendant controverted the right, and said he was not obliged to give an account before that was settled; and your lordship was of opinion, that he having answered, the charge of the bill must be answered. Ibid.

7. Bill to discover how much money defendant paid for the purchase of, &c. and to whom, and what remains unpaid, and that the plaintiff might be satisfied a debt of 1800l. due from the vendor; defendant pleads that he is a purchaser for a valuable consideration, and that he has paid and secured the purchase-money; but because he did not set forth how much the purchase-money was, nor to whom he paid the same the plea was over-ruled, and defendant ordered to answer those particulars without costs, but the purchase not to be impeached. Fin. R. 219. Trin. 27 Car. 2. Cautrell v. Manninton.

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8. A bill was preferred for discovery of title and writings. The defendant pleads he was a purchaser for a valuable consideration without notice of the plaintiff's claim, and so demurs. The plea was ruled to be ill per Cancellar'. because he does not set forth the particular consideration, but if that had been expressed it had been good, and so it was held in one Snagg's case. 2 Freem. Rep. 43. pl. 47. Mich. 1678. Millard's case,

9. Motion was made that the defendant might discover the names of the witnesses to a deed by which the defendant claimed by his answer which the plaintiff by bill charged to be antedated, but the antedating denied by answer. Per Ld. Chancellor, that may tend to prepare, or otherwise to tamper with the witnesses, and therefore denied the motion, but if there were apparent suspicion it may be. 2 Ch. Cases. 84. Hill. 32 & 33 Car. 2. Anon.

10. A purchaser of lands subject to a judgment without notice thereof shall not be obliged to discover. 2 Ch. Cases. 47. Hill. 32 & 33 Car. 2. Snelling v. Squibb.

But it seemed otherwise if the lands had

been subject to a decree. Ibid. 48. — But he must set forth that he had no notice of the judgment. 2 Vent. 361. Anon.

11. By Lord Chancellor it is an infallible rule, that a purchaser for a valuable consideration shall never, without notice, discover any thing to hurt himself. 2 Ch. Cases. 73. Mich. 33 Car. 2. Perrat v. Ballard.

2 Vent. 361. S. P. — This was in a case of goods bought of

one that after was bankrupt.

12. Purchaser

Ibid. 136. 12. Purchaser of goods of a bankrupt without notice of the bankruptcy, and for which goods he paid the money without notice, is not bound to discover. 2 Ch. Cafes. 135. Hill. 34 & 35 Car. 2. *Brown v. Williams.*

3 Ch. R. 41. *Gladwyn v. Savil.* 22 Car. 2. S. P. — N. Ch. R. 141. S. C. Defendant pleaded his purchase-deed, and that the bankrupt was really indebted to him when it was executed, and the court would not compel him to answer as to notice, — 2 Ch. Cafes. 156. *Wagstaff v. Read.* S. P. as to goods, and there Lord Keeper distinguished, that if the sale were *as an extreme necessity* the plea should not stand, and at length ordered defendant to answer, *what the goods were, and what he paid for them*, but plaintiff not to take advantage thereof at common law, and the plaintiff to subscribe his consent with the register. — But would not compel him to *shew the time when*, for fear it should over-reach, and be within the time after an act of bankruptcy committed. *Skium.* 149. pl. 21. Mich. 35 Car. 2. Anon. seems to be S. C.

13. The want of notice must not be pleaded by a purchaser for a valuable consideration, but *must be put in by answer*; per North K. 2 Ch. Cafes. 161. Hill. 35 & 36 Car. 2. Anon.

Hard. 510. 14. It is not the practice of Chancery to compel a purchaser to answer matters to impeach his grant. Arg. Vern. 291. Mich. 1684. in case of the King v. Vernon.

North K. 15. Bill of discovery lies in equity, though for matters founding in tort. Per North K. Vern. 308. Hill. 1684. *Last-India Company v. Evans & al.*
cited the case of a man's carrying his mine under his neighbour's ground, and where a man run away with a casket of jewels, he was ordered to answer, and the injured party's oath allowed as evidence in *odium spoliatoris.*
Ibid.

This should have been entered at (A).

[546] (E) Bill of Discovery by Purchasers.

1. BILL by assignee of an extent against the tenant of the lands to enforce him to deliver to him a true note in writing of the date of the deed, and for what term of years he had it in lease, and under what rent reserved, but not any of the covenants or conditions contained therein. See N. Ch. R. 2 Pasch. 2 Car. 1. *Jackson v. Barrow.*

2. Defendant ordered to shew evidences to direct what tenants ought to attorn, and to discover who is tenant. 11 Car. Toth. 78. *Pie v. Bevil.*

3. Bill by a purchaser to discover a charge and to preserve testimonies. The defendant discovered a lease for 1000 years. It being a severe case on the plaintiff, there is no reason for the plaintiff to pay costs at law, or in this court. 2 Ch. R. 172. 26 Car. 2. *Trethervy v. Hoblin.*

2 Chan.
Cafes 9.
Trethervy
v. Hoblin.
6. Q.

(F) Bill of Discovery.

By Creditors.

1. **I**N a bill to discover *upon what consideration a bond was given* that had been assigned to the king as a debt in aid; the court held, that a man was not bound to discover the consideration of a bond, which implies in itself a consideration; and so Baron Atkins said, it had been ruled in Chancery. Hardr. 200, 201. pl. 4. Trin. 13 Car. 2. Turner v. Binion.

2. A. confesses a statute to B. B. extends the lands. J. S. a creditor by judgment subsequent to the statute, takes A. in execution on the judgment, and then brings a bill against B. the confessee, to discover incumbrances, which he insisted he could not have after A's death, and therefore ought to have it now. B. pleaded the matter above, and therefore that the plaintiff could not extend his lands, nor were they liable to his debt during the life of the cognizor, and though it was urged that it had been ruled that such a bill will lie, notwithstanding the debtor is in execution at the suit of the plaintiff, yet the court inclined that this part of the plea was * likewise good. N. Ch. R. 89. 15 Car. 2. Churchill v. Grove.

But, but the court inclined in opinion, that this part of the plea was * not good. — 2 Freem. Rep. 176. pl. 237. S. C. says, that as to the last point it was confidently affirmed and not denied that it was no plea, because the land would become chargeable after the death of him in execution, and therefore the defendant ought to answer and discover.

3. If you sue the executor of one obligor to discover assets, you must make all the obligors parties, that the charge may be equal; but if a judgment be against one obligor, his executor may be sued alone for a discovery of assets, because the bond is drowned in the judgment. 2 Vent. 348. Trin. 32 Car. 2. in Canc.

But quare as to the first party for (ut audi) Lord Ch. King held other-

wife in 1725.

4. A. brought debt against B. and got judgment and lodged a *fi. fa.* in the sheriff's hands, who returned *nulla bona*; the plaintiff may bring a bill against the defendant or any other, to discover any goods or personal estate of the defendant, and by that means to affect the same; but he must go as far as he can at law by delivering this writ of *Fi. Fa.* and getting it returned. Wms's Rep. 445. cited by Mr. Vernon. Trin. 1718. to have been so held by Ld. Nottingham.

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(G) Bill of Discovery relating to Wills and Personal Estate.

After such plea pleaded at law a bill was

brought, and the same pleaded here but over-ruled, and defendant ordered to answer without payment of costs. N. Ch. R. 127. S. C.

1. *O B L I G E E* may sue in chancery to discover *assets* before a plene administravit pleaded. 3 Ch. R. 26. Trin. 20 Car.

2. Pitt v. Scarlett.

2. Bill to discover *a will*, defendant pleaded in bar *a title by the said will to himself*, and demurred for that the *plaintiff sets forth no title to himself*, so as to demand a discovery, and the court allowed both plea and demurrer. Fin. R. 36. Mich. 25 Car. 2. Ramere v. Rawlins.

3. Bill to discover a *personal estate and will*, defendants demurred, for that they and another have proved the said will, and if be *unduly proved* the plaintiffs have a proper remedy in the spiritual court, and by the civil law, to avoid the will, and cannot till then intitle themselves to an account of the personal estate, they not alleging themselves to be creditors or legatees, and that if the *plaintiff was executor* thereof, yet he is not intitled to the personal estate till the will is proved, and the execution thereof by the plaintiff. The court allowed the demurrer. Fin. R. 88. Hill. 25 Car. 2. Blondell v. Pannet.

4. Bill to discover *assets*, and does not charge that any came to his hands, is ill. Chan. Cases. 226. Pasch. 26 Car. 2. Davis v. Curtis.

5. Discovery decreed though *against the express words of the will*, which was, that the declaration of the executor should be taken and without being compelled thereto by law, 2 Chan. Cases 198. Trin. 26 Car. 2. Gibbons v. Dawley.

6. Bill was to *set aside a will* made by J. L. who was the husband of the defendant M. now deceased, for that the said will was irregularly obtained; and amongst other things, to discover what portion the said M. brought to her late husband J. L. who made this pretended will. The defendants by their answer deny that the will was irregularly obtained, and plead the same in bar. And as to the other part of the bill they demur; it appearing by the plaintiff's own shewing, that he has no title to have such a discovery as prayed. The court allowed the demurrer with costs, but ordered the plaintiff to reply to the plea. Fin. Rep. 397. Mich. 30 Car. 2. Lloyd v. Williams.

7. Bill for a discovery of the personal estate was brought before the will was proved, the same being controverted in the spiritual court. The same was pleaded to the bill, but over-ruled; a discovery being for the benefit of all persons interested, and necessary for the preservation thereof, and such discoveries have been often ordered

pendente

pendente lite in the Spiritual Court. 2 Vern. 49. pl. 47. Pasch. 1688. Dulwich Coll. v. Johnson.

8. It is usual to prefer bills to discover *assets before they begin at law*, that if any discovered, the plaintiff might produce the answer in evidence at the trial at law. N. Ch. R. 158. Hill. 1 W. & M. Wright v. Carew.

9. *Will concerning personal estate proved in the Spiritual Court, respondent having a former will in his favour brings his bill to discover by what means the latter will was obtained, and to have an account of the personal estate, and whether the testator was not incapable and imposed upon.* Defendant demurred, because it belonged to the Spiritual Court only to prove the validity of wills, and the former will was not proved in the Spiritual Court, as the will in his favour was, demurrer over-ruled. M.S. Tab. Feb. 6, 1723. Andrews v. Powers, or Powis.

10. By the ancient course of the court, a person was allowed to bring his action at law against the representative of the deceased, and at the same time to bring his bill here, in order to have a discovery of assets; though now it is established that if the party proceeds in equity against such representative, his *bill must be both for a discovery of assets and a satisfaction for his debt.* Barnard. Chan. Rep. 278. per Ld. Chancellor. Hill. 1740, in case of Barker v. Dumeres.

(H) Bill to discover a Trust.

1. **I**F a trustee does by fraud and combination with the cestuy que trust endeavour to *evade any penal law as the statute of simony, &c.* under pretence, that a trust is only cognizable inequity, and that equity should not assist a penalty or forfeiture, yet *Chancery will aid remedial law* and not suffer its own notions to be made use of to elude any beneficial law. Abr. Equ. Cases 131. Pasch. 1706. Attorney General v. Hindley.

(I) Bill of Discovery against Counsellors, Attornies, &c.

1. **B**ILL was to discover several *matters relating to the estate and affairs of B.* Defendant *pleads* that he was attorney in several causes and faithfully managed the same for B. and ought not to discover them; and the plea was allowed. Fin. R. 82. Hill. 25 Car. 2. Legard v. Foot.

2. Bill was for the discovery of *a deed and the contents of it in the defendant's custody.* The defendant demurred, for *that he is an attorney at law, and was intrusted by his client with the said deed and with*

[549] *other deeds and writings*, and therefore ought not to discover the same, or the contents thereof, or any other matters which came to his knowledge, as he is an attorney, and employed in the affairs of his clients. The court was of opinion, that there ought to be a discovery, and ordered the same accordingly, viz. whether there was such deed or deeds, and where the same is or are, and to whom delivered, and when he last saw the same, and in whose custody; but not to produce or discover the dates or contents thereof. Fin. Rep. 259, 260. Trin. 28 Car. 2. Kington v. Gale.

(K) Between Landlord and Tenant.

1. **W**HETHER a licence to assign a lease were granted or not, being but three years past, the defendant was ordered by my lord to answer *directly*, and not to his remembrance. 38 & 39 Eliz. Toth. 71. Oswald v. Pennant.

2. Grandson and heir of the lessor brings a bill against the son of the lessee to discover *boundaries*, the lands leased, and the lessees own proper lands lying contiguous and the fences thrown down, and an account of rent arrear, and of *heriots*, &c. there being a heriot reserved upon the death of every life. Defendant *demurred*, because plaintiff had not made oath of the loss of the counterpart of the lease it appearing by the bill that the lease was not determined and for that he did not offer to confirm the lease for the residue of the term. Ordered to answer as to the boundaries and what he knows of the payment of any rent and after that is done there shall be no farther proceedings in this court. Fin. R. 239. Mich. 27 Car. 2. Glyn v. Scawen.

3. Bill was to discover whether the defendant had not assigned over a lease; the defendant pleads that there was a proviso in the lease, that in case he assigned over, the lease should be void; and that this being in the nature of a penalty, or forfeiture he ought not to be compelled in a court of equity to discover; but for the plaintiff it was said, that this was not a penalty, but part of the contract; yet the plea was allowed. Abr. Equ. Cases 77. Hill. 1700. Fane v. Atlee.

(L) Bill of Discovery by or against a Jointress.

* Fin. R.
97. Atkins
v. Nunn.

1. **B**ILL brought by a jointress to discover * *incumbrances* on the jointure lands which were greatly deficient; defendant pleaded that she is purchaser for a valuable consideration, having paid so much money to the husband, and that she had a verdict and judgment at law for 1000l. which was affirmed on a writ of error. But

But the question being *whether any more than the principal sum of 1000 l. was secured on the lands* claimed by plaintiff for her jointure, and *what is due to defendant for principal and interest*, the court ordered her to answer that particularly. Fin. R. 143. Mich. 26 Car. 2. Osborn & al. v. Brown & al.

2. By Serjeant Maynard. It is the course of chancery, when a bill is exhibited against a jointress to discover writings, not to compel her to do it till such time as the plaintiff agrees to confirm her jointure. Vent. 198. Pasch. 24 Car. 2. B. R. in the case of Jones v. the Countess of Manchester.

3. A jointress is not bound to answer, whether her baron had any other title than as assignee of a mortgage she by answer denying that she had any notice of the mortgage, and insisted that her baron told her, he was in by descent, was allowed an *answer sufficient*. Per Ld. Chancellor. 2 Vern. 701. Mich. 1715. Stephens. v. Gaule.

(M) Of Deeds.

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1. **L E S S E E** to shew commencement of term, things demised, rent, what days of payment of rent, and covenants. Toth. 226. cites 34 Eliz. Lib. B. fo. 394. Snagg v. Snagg.

2. It is most usual in Chancery to demand evidence concerning the complainant's lands, to which he makes title, which are not in chests, bags, or boxes, and whereof he *knows not the date*, &c. Cary's Rep. 21, 22.

3. Where a bill is *barely for discovery of a deed* and prays not relief upon it; *oath* need not be made of the not having it. N. Ch. R. 78. Anon.

Same diversity taken by Serjeant

Glyn, and approved by the Ld. Chancellor. Chan. Cases 11. Anon. and seems to be S. C. — Vern. 180. pl. 175. Trin. 1683. Anon. S. P. for discovery of a bond without praying relief held accordingly. — Ibid. 247. pl. 241. Trin. 1684. Godfrey v. Turner. S. P. accordingly per Cur. For you shall not translate the jurisdiction without oath made of the loss of the deed.

So where plaintiff prayed a discovery of the counterpart of a lease, and *general relief*, though plaintiff had charged, that several covenants were broken, but prayed no recompence, and the praying relief generally was only applicable to the particular relief he had before prayed. Abr. Equ. Cases 14. pl. 4. Trin. 1729. Whitworth v. Goulding. — S. P. as to the general relief being applied to a discovery, resolved the same day between King v. King. Ibid. 2 Wms's Rep. 541. pl. 174. Whitchurch v. Golding S. C. ut supra. and S. P. held accordingly? but if the bill be for relief generally upon any deed or bond, as to recover the money upon the bond, or the profits of land under the deed, in this or the like case, there must be an affidavit annexed to the bill that the deed is not in the plaintiff's custody, because such a bill does by consequence seek to transfer the jurisdiction from the common-law to the court of Equity. — But see Vern. 59. pl. 56. Trin. 1682. Anon. Same diversity but resolved vice versa.

4. A purchaser shall not be obliged to produce *deeds containing the title of others*, and thereby to impeach his own title. 3 Chan. Rep. 32. 14 Nov. 21 Car. 2. Borrington v. Borrington.

5. Bill to discover *deeds* and writings, which plaintiff claims as belonging to several manors and lands, &c. Defendant *pleads a devise of the said lands to him* by will duly proved, and that if the plain-

tiff has any remedy it is at law. Plea allowed. Fin. R. 82. Hill. 25 Car. 2. Legard v. Foot.

6. Bill by an heir against lessee, to discover a lease not determined and made by his ancestor. Defendant demurred, because the plaintiff had not made oath that the counterpart was lost, and for that he did not offer to confirm the lease for the residue of the term. Demurrer allowed. Fin. R. 239. Mich. 27 Car. 2. Glynn v. Scawen.

7. Bill against an attorney, to discover a deed and the contents of it in the defendant's custody. Defendant demurred, for that he is an attorney at law, and intrusted by his client with the deed, and ought not to discover what came to his knowledge as he is an attorney and employed in the affairs of his clients; but ordered to answer if there was such deed, and where the same now is, and to whom delivered, and when he last saw the same, and in whose custody, but not to produce or discover the date or contents. Fin. R. 259. Trin. 28 Car. 2. Kington v. Gale.

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8. Bill to discover and have the use of a deed to lead the use of a fine levied by defendant's mother, and concealed and suppressed by her. The case was, defendant's mother was seized in fee, she and her husband levied a fine, which by deed was declared to be to the use of the husband and wife, with other uses, under which the plaintiff makes title, viz. by the husband's will, the fee being limited to the husband. The complaint is, that the defendant suppresses the deed; the defendant is heir to her mother, and insists that the fine was gained unduly, and denies the having the deed, which was voluntary without consideration, and the conveyance by fine, &c. was voluntary and without consideration, no money being paid, &c. The court would give no relief, but left the plaintiff wholly at law to help himself there if he could. 2 Chan. Cases 133. Hill. 34 & 35 Car. 2. Anon.

9. Where an estate tail is discontinued, though by a voluntary conveyance, such grantee is not to be compelled by the issue to discover the deed of intail. 2 Vern. 50. pl. 48. Pasch. 1688. Bunce v. Philips.

The court would not order the plaintiff to see what covenants were in a lease or deed, and when such lease should determine.

10. Bill by a bishop against an assignee of a lease, charging that he knew the lease was expired, and that it appears so by deeds in his hands. Defendant pleaded the lease, and that he was a purchaser, and was told that at his purchase in 1677 there were 57 years to come, and therefore gave 19 years purchase for it, and so ought not to discover any thing to impeach his title. Plea allowed and demurrer also. 2 Vern. 225. Hill. 1691. the Bishop of Worcester v. Parker.

Toth. 116. cites Mich. . . . Jac. Saltonshall v. Wildbore.

S. P. Per Wright K. but Matter of Rolls contra. Abr. Equ. Cases 333. S. C.

11. A. suggests, that in a mortgage by B. to C. which had since been assigned to D. there was a trust declared for the benefit of A. and prays that D. may produce the deed. D. denies by answer any such trust in the mortgage-deed, saying that by this all purchasers might be

be blown up. *Q. tamen.* 2 Vern. 463. Mich. 1704. Hall v. Atkinson and Daniel.

12. *Persons who claim lands by a will or any other voluntary disposition*, having the law on their side, are intitled as against an heir at law to a discovery of equity in deeds relating to the estate as to have them delivered up, otherwise the heir might defend himself at law by setting up prior incumbrances, and by that means hinder the trying the validity of the will. MS. Tab. May 19th, 1713. Dutches Newcastle v. Lord Pelham.

13. A coheir *disinherited* by the will of his ancestor may inforce the other coheir, in whose favour the will is, to produce the settlement of the estate, that he may see if his ancestor had power to make such will and give the lands from him, and that before he contests the will. 9 Mod. 99. Mich. 11 Geo. Floire v. Sydenham.

S. C. & P. and the inquiry shall be made first as to the power of making a will before

the making it shall be inquired; and it was decreed that all deeds should be produced, and the counsels opinion; not as they will be a guidance to the court, but for the case on which they might be founded; for in those cases papers may be mentioned which might otherwise be suppressed and not come to light. Sel. Ch. Cases in Ld. K's time. 2 Mich. 11 Geo. 1. 1724.

(N) Bill of Discovery. To bring Actions.

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1. **W**HERE *certainty wanteth* the common law faileth, but yet help is to be found in Chancery for it; for if the *Queen* grant to me the goods of *A.* who is *attainted for felony*, and I know not the certainty of them, yet shall I compel any man to whose possession any of them are come, to make *inventory* of them here. Cary's Rep. 21 cites 36 H. 6. 26.

2. The defendant *being tenant for life* was ordered to be examined for making known to whom the reversion of the lands in question were to pass, which, if the refuse, then the parties to proceed in suit, notwithstanding her present estate. Toth. 235. cites 11 & 12 Eliz. Mayor, &c. of Feversham v. Lady Amcoats.

3. The court compels tenants for years to set down in certain the time of the making, commencement, determination, and what rents are reserved, and the times the same are payable, to the end the same may be liable to an extent upon a statute. Toth. 281. cites 30 Eliz. li. A. fol. 311. Buck v. Lupton.

4. The defendant was forced to set down to whom he assigned his lease, because otherwise the lessor would have no action of waste, and to set down the names of the persons whom he had caused to fell trees, whereby the lessor might have his action against them. Toth. 71. cites 38 & 39 Eliz. Standon v. Bullock.

5. A bill to find a tenant to an estate whereby to ground an action of dower; Toth. 84. cites Mich. 2 Car. Lord Kemp v. Risbie.

6. A Bill to discover a patron, whereby to impower one to bring

bring a quare impedit. Toth. 262. 2 Car. Comes Pembroke v. Bostock.

Cary's Rep. 82. cites 19 & 20 Eliz. Crefwell v. Luther. Admitted per Pemberton, Arg. on the other side. Ibid. North K. cited the case of a man's carrying his mine under his neighbour's ground, and where a man run away with a casket of jewels, he was ordered to answer, and the injured parties oath allowed as evidence in odium spoliatoris. Ibid.—Fin. Rep. 117. East-India Company v. Blake. S. P.

7. If a man has cause to demand land by action, and knows not the *tenant of the land*, by reason of the making of secret estates it hath been lately used to draw them in by oath to *confess the tenant*, but it is now doubted. Cary's Rep. 22.

8. A man shall have a discovery in this court *in order to bring an action of trover*; Arg. and said it is a common case, and cited the Printers case in this court. Vern. 307. pl. 300. Hill. 1684. in case of the East-India Company v. Evans.

9. Bill of discovery lies in equity, though for matters founding in *tort*. Per North K. Vern. 308. pl. 300. Hill. 1614. The East-India Company v. Evans, & al.

10. A clothier sends goods to his factor to sell; the *factor pawns the clothes*; clothier brings a bill to discover *if the clothes came to the hands* of the defendant, who answers that some clothes were pawned to him, but did not admit they were the plaintiff's. Ld. Jefferies ordered that the plaintiff and others with him might have a sight of them, and this was to enable him to bring an action, Vern. 407. pl. 381. Mich. 1686. Marlshden v. Panthall.

11. There is no reason to compel a man to discover the *boundaries in his deed*, for that would be to help a man to evidence to evict my possession. 2 Vern. 38. pl. 34. Mich. 1688. Hungerford v. Goring.

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Ibid. 443.
Morfe v.
Buck-
worth. S. P.

12. Bill to discover *who was owner of a wharf and lighter, to enable plaintiff to bring an action* for the damages he sustained by the lighters being overset by negligence of a lighter-man; defendant demurred; demurrer over-ruled. 2 Vern. 442. pl. 406. Mich. 1702. Heathcott v. Fleet.

13. A *ship taking fire* by the neglect of the master or ship's crew, the plaintiff who was *one of the freighters*, and had his goods burnt, brought his bill to discover *who were part-owners of the ship, to enable him to bring his action*. The defendant demurred. In the case of HEATHCOTT v. FLEET, and also in this case it was insisted on for the defendant, that it was a hard demand in its nature. The plaintiff might recover at law, as he could, but was not to be assisted in equity; and compared' it to the case where a fire happens in a man's house, and burns his neighbours also; although he is liable to damages at law, yet the plaintiff in such case shall not be assisted in equity. Per Cur. The cases are not alike: in the case put it is true, the law gives an action; but it does not arise out of any contract or undertaking of the party; but in the cases before the court, the lighter-man receives a premium, or wages for undertaking to conduct the goods to the wharf; and so the masters or owners are by agreement to have freight for carrying and transporting of the goods; and it is within the reason of the case of any common carrier; and therefore over-ruled the demurrer, and ordered the

the defendants to answer. 2 Vern. 443, 444. pl. 407. Mich. 1703. *Morfe v. Buckworth*.

14. Where a bill will not lie in equity to discover the *concealment of goods*, when the concealment was *to prevent their being taken in execution*, see *Barnard*. Chan. Rep. 39. Pasch. 1740. *Lowthal v. Jenkins*.

(O) Bill of Discovery.

Relating to Marriage and Marriage Settlements.

1. **BILL** supposes a settlement on the plaintiff in remainder after the death of E. the defendant's former wife, and on certain condition depending on that estate of E. and to examine witnesses, to those points. Defendant set forth a *settlement* subsequent to the time pretended for the first settlement on a second marriage, and issue of that marriage had 15 years since, and the *plea* allowed, for it was alledged at bar, that in truth this bill was but *an artifice to examine a second marriage, which whether it was not in the life of E. his first wife*, and so to bastardize the children by the second wife. *Ld. Keeper* allowed the plea. 2 Ch. Cases, 209. Mich. 27 Car. 2. *Duke v. Duke*.

2. A. the eldest son of B. brings a bill against B. and J. S. to be relieved touching of B's marriage articles, B. having received 2 Vent. 357. 2 C. 9000 l. of A's wife's fortune, and yet refused to make any settlement, but took advantage of a *defect in the marriage articles*, and in order to be relieved prayed a discovery of the *incumbrances* on B's estate agreed to be settled on the marriage; it was insisted that the plaintiff by the marriage article *had no title* to the estate in question, and therefore they were not bound to discover incumbrances. *Finch C.* ordered defendants to answer to the incumbrances. Vern. 74. pl. 69. Mich. 1682. *West v. Ld. Delaware and Cutler*.

3. Bill to establish a separate maintenance for defendant's wife, & inter al. prayed a discovery of several *unkindnesses and hardships* which defendant had used, as was pretended, to her to make her recede from this agreement. Demurrer allowed, as a matter not properly examinable or relievable in this court; per *North K.* Vern. 204. pl. 200. Mich. 1683. *Hinks v. Nelthorpe*.

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(P) Bill of Discovery.

Of what Estate a Man has.

1. **W**HETHER a *jointenant* shall be enforced by law to disclose a *partition in the life of his fellow*. See Toth. 72.

2. *Lessee for years of conusor of a statute* was compelled to discover what estate he had from the conusor to the end *that it might be liable to the statute*. See Toth. 226. cites 25 Eliz. Titchburn v. Doddington.

3. *Tenant for life* sought a discovery *on what account a fine levied*, and to what uses, and for what consideration. Defendant demurred for want of sufficient title in the plaintiff. 3 Ch. R. 27. Trin. 21 Car. 2. Hilliard v. Lincester.

Abr. Equ.

Cases 76.

pl. 8. cites

S. C. But

says, see

Cary 22.

where it is

said, that

such cases have been frequent.

—So to discover the tenant to the

precept in a voluntary conveyance,

demurrer allowed; per North K.

Vern. 273, pl. 271, Mich. 1684.

Sherborne v. Clerk.

4. Bill to discover who is *tenant of the freehold* in order to bring a *formedon*, will not lie, per North K. for there are other ways to know it. Though the case of Bickerton v. Bickerton was cited, where such a demurrer was disallowed, yet per North K. the demurrer was good. Vern. 212. pl. 210. Hill. 1683. Stapleton v. Sherard.

(Q) Bill of Discovery.

Relating to Sea Affairs, and Companies trading into Foreign Parts.

1. **B**ILL to discover *what title defendants had to a ship in question from B.* in which plaintiff had an 8th part by a bill of sale from the said A. dated in May, 1671, and that if defendants had any title it was subsequent to that of the plaintiff's. Defendants *plead a bill of sale from B. for a full and valuable consideration, without notice of plaintiff's bill of sale*; plaintiff replied that defendant might be a purchaser, and yet it might be of some mortgage, or upon some trust or agreement. Ordered that *defendant answer whether on any mortgage, trust or agreement*. Fin. R. 152. Mich. 26 Car. 2. Letton v. Penfax.

2. Bill to discover *goods seized by virtue of the patent to the African Company*, but Ld. Chancellor refused to give assistance to discover in Canc. in prejudice of the king's charter. 2 Chan. Cases 95. Pasch. 34 Car. 2. Brookes v. Bradley.

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3. The defendant and other seamen *libelled in the Admiralty court for their wages, and set forth in their libel, that they went to such a place*

place or coast in the East-Indies, and that the plaintiff had not paid them their wages, &c. Sir James Montague moved for a prohibition, for that court will not, by their way of proceeding, receive our answer but upon oath; by which means we will be forced to *discover that we traded to the East-Indies, and so incur a penalty inflicted by act of parliament*, which is general, prohibiting all the subjects of England to trade or traffick there, except they have a licence, or are of the East-India Company. Besides, these mariners have a contract under hand and seal for their wages, on which they may sue at law. But the prohibition was denied, for it is reasonable and just whether their going thither was lawful or not, that you should pay them their wages. There is *no unlawful act suggested*, and if there be a contract under hand and seal for their wages, yet the Admiralty may have jurisdiction thereof as incidental; but if they judge contrary to our law, we will prohibit them. But they on the other side deny the contract to be as you have alleged. Holt's Rep. 49. pl. 6. Mich. 5 Ann. Gawne v. Grandee.

4. The defendant was one of the *super-cargoes* of the Royal George belonging to the plaintiffs; and on his being so appointed, entered into a bond, with sureties of 5000 l. penalty *not to trade to any of the places prohibited by the act of 9 of 2. Ann* for erecting the South-Sea-Company, or contrary to the assiento contract with the King of Spain, and several other restrictions; and he on his part covenanted not to trade to any of the said places, or contrary to the said contract, and covenanted *not to plead or demur to any bill* which should be brought against him in equity for a *discovery* of his trading or dealings contrary to his agreement, and this bill was brought, charging him with several breaches of covenant to the prejudice of the plaintiffs, to the amount of several 1000 l. and for a discovery thereof, &c. and the *plaintiffs* by their bill *waived the 5000 l. penalty of the bond*. To this bill the defendant pleaded the statute 9 Ann, and several articles of the assiento contract, whereby whoever traded contrary thereunto were liable to great penalties, as confiscation of ship and goods, and several other forfeitures. And it was strongly urged, that by law no one was bound to discover any matters which tended to subject him to penalties or forfeitures; that it was the business of courts of equity to relieve against, not to assist forfeitures; and that this covenant not to plead or demur, was illegal and void in itself, as it tended to deprive him of the benefit of the law, like a covenant not to bring a replevin, or such like; but the plea was over-ruled, because he certainly might, if he thought fit, forego or waive the benefit of the law in those particulars, which here he has expressly covenanted to do; and which were the more necessary to be required of him, as the plaintiffs themselves were under like penalties in case any of their factors or agents traded contrary to that act, or the assiento contract. And this covenant not to plead or demur, was purposely to obviate the pretence, that he ought not to discover any thing whereby to subject himself to any penalties; which since he has expressly consented to and covenanted for, he shall not now be at liberty to object to the
illegality

illegality of. And it was said to be so resolved in a like case between the East-India Company and Atkins, in the time of the Lord Macclesfield, on a very solemn debate. Abr. Equ. Cases 77, 78. Mich. 1728. South-Sea Company v. Bunistead.

- [556] 5. The *secretary and book-keeper of the East-India company* were made defendants to a bill for a *discovery of some entries and orders of the company*; the defendants demurred, for that they might be examined as witnesses; also because their answer cannot be read against the company; the demurrer was over-ruled, lest there should be a failure of justice, in regard the company are not liable to a prosecution for perjury, though their answer be never so false. 3 Wms's Rep. 310. Trin. 1734. Wych v. Meal,

For more of Discovery in general, see other proper Titles.

Discount.

(A) Discount or Stoppage, or setting off mutual Debts one against another. Allowable in what Cases.

1. IF a man leases land for life rendering rent, and disseises the lessee, and he recovers by assise, there the arrearages due before the disseisin shall not be recouped, but only the rent incurred during the disseisin, and after he shall have assise of the arrearages due before and after, and this was found, by which he recovered, but the damages were severed. But Brook makes a quære; for it seems he shall have only distress. Br. Damages, pl. 132. cites 9 E. 3. 8. and Fitzh. Assise 153.

2. In assise it was found that the baron enfeoffed A. and died, and one entered without covin of the feme and endowed her, and A. brought assise against the abator and the feme, and therefore the plaintiff recovered two parts and damages, and the feme retained the third part in dower, and the third part of the damages was recouped. Br. Damages, pl. 96. cites 12 Aff. 20.

3. Damages of 40s. and no more was found by the assise, because the land is sown, and the house well amended, and so recouped the damage. Br. Damages, pl. 82. cites 24 E. 3. 50.

no damages, because the place was amended by building quod nota; for this was found by the verdict. Br. Damages, pl. 99. cites 14 Aff. 13.

So the plaintiff recovered the land, and

4. Disseisin is done ad damnum 9l. The disseisor sows the land which is worth 10l. The assise gave the damage to 9l. They shall be attainted per Cur. because they did not recoup the sowing of 10l. And attain does not lie before the execution of the damages. Itinere Canc. But Brooke says quære inde, for after judgment. Br. Damages, pl. 199. cites 24 E. 3. 50.

5. A man granted a rent-charge of 10l. out of his land, the grantee disseised the grantor of the land out of which, &c. and he brought assise and recovered to the damage of 10l. above the 10l. which the defendant ought to have during the time of the disseisin for his rent; and per Cur. the 10l. of the rent for the time shall be recompensed in damages, and the plaintiff shall not recover the whole 20l. in damages, but shall make recouper of 10l. because during this time if no disseisin had been the disseisor ought to have had 10l. in rent, and it is circuity of action that the plaintiff in the assise shall recover the 20l. and then the defendant to recover 10l. again; and the same law it is said where the lord disseises his tenant, or if he who has estovers, &c. disseises the tertenant, but this is

only

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S. C. cited Arg. 5 Rep. 30. b. Mich. 40 and 41 Eliz. B. R. in Coulter's case, and there pag. 31. a. the court said, that as to the case of recouper in damages in

the case of
rent ser-
vice, charge,
or feck, it

only where this matter is found by the verdict, for otherwise it cannot be recouped. Br. Damages, pl. 7. cites 3 H. 6. and as it seems Fitzh. Damages 18.

Br. Condi-
tion, pl.
181. cites
S. C.

6. One debt *retained* for another when each was indebted to the other in 10l. and a good bar in debt upon an obligation with condition, quod nota. Br. Dette, pl. 172. cites 22 E. 4. 25.

7. Where the lord disseises his tenant, and the tenant brings assise and recovers, the rent due to the lord shall be recouped in the damages. Per Rede. Br. Trespas, pl. 270. cites 4 H. 7. 10.

Cro. J. 178.
in case of
Gibson v.
Searle. S. P.

8. A. has a rent out of B's manor; B. makes A. his bailiff of his manor. In account A. shall have his rent by way of retainer. Per Fineux. Kelw. 64. T. 20 H. 7. pl. 2. Anon.

9. If a disseisor sells trees and repairs the houses with them, and assise he brought against him, the same shall be recouped in damages, because what was done was a commodity. Arg. Godb. 53. pl. 65. Mich. 28 and 29 Eliz. B. R. Dike v. Dunston.

10. If a disseisor pays rent, it shall be recouped in damages. So if one enters as guardian, who is not guardian, he shall have allowance for all reasonable acts as a lawful guardian should. Cro. E. 631. pl. 36. Mich. 40 and 41 Eliz. B. R. in case of Ireland v. Coulter.

11. By the custom of foreign attachment in London, if it be testified that the plaintiff was indebted to the same person whom he sues, he may attach. Cro. E. 843. pl. 25. Trin. 43 Eliz. C. B. Hodges v. Cox.

12. If a trustee for sale of lands for payment of debts disburses money of his own to the value of part, or of all the estate, he becomes a purchaser pro tanto, or for all. Ch. Cases 199. Pasch. 23 Car. 2. Lambert v. Bainton.

13. A. conveyed lands in trust for payment of debts; a rent of 15l. per annum was issuing out of part of the lands and which were in the hands of B. a creditor; A. and B. die. The executors brought a bill against the heir of A. and the trustees (who had surrendered the lands to the heir as they insisted they had a power by the settlement to do to enable him to make a jointure) the trustees say, they permitted B. to retain his rent towards satisfaction of his debt. Decreed it was not to go in discharge of the debt and if any rent was due, there was a remedy at law, and no ground for this court to stop it, and ordered the heir to pay the debt with damages for forbearing from the time it was charged on the lands, and with costs. Fin. R. 65. Hill. 25 Car. 2. Lawrence v. Balker-ville & al.

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14. It was held that if A. owes B. 100l. by recognizance, and B. owes A. 50l. or 10l. upon any security whatsoever; and A. sues B. that

that cannot compel A. to pay himself by way of retainer out of what is due to him, but they must take their mutual remedies, unless there were any agreement to the contrary. 2 Freem. Rep. 28. pl. 31. Hill. 1677. In Canc. Sir William Darcy's case.

15. Covenant upon a charter-party between the merchant and a master, the merchant was to pay so much for freight, and the master to deliver the goods at such a port; breach is assigned in non-payment of the freight; the defendant pleads, that the master has damaged, wasted and imbezled the goods to the value of the freight; and that there was a custom to detain the money which should be paid for the freight in lieu of the goods; plaintiff demurs; the court thought that plea good, though to a covenant, if there was such a custom, wherefore the plaintiff prayed leave to waive his demurrer and to take issue, which was granted. Note, such a custom there is between the master and hired seamen to deduct out of their wages what goods are damaged, which makes them the more careful, as several of the bar said. 2 Show. 167. pl. 159. Mich. 33 Car. B. R. Bellamy v. Ruffel.

2 Jo. 186.
S. C. but
S. P. does
not appear.

16. A. B. and C. were partners in a trade at Leghorn. Upon account they dissolve their partnership, and A. had his share satisfied him out of the stock. Many years afterwards A. had occasion to receive 500 dollars at Leghorn which was to be paid him for merchandize by D. another stranger which no way related to the partner's trade. The 500 dollars were consigned by bill drawn on J. S. by C. payable to A. to be received for his [C's] use, and A. received them. C. sued at law for the dollars, A. sues here to be relieved, and insists that he ought to detain the same, because when the partnership was dissolved, C. did covenant to save him harmless from all losses and damages due, or which might be due, or brought on, or which might or should happen to him, the said A. in relation to his part; and that long after the dissolution of the partnership he was sued by the Duke of Tuscany for customs unpaid at Leghorn, for the goods which belonged to the joint trade, which amounted to 60l. and costs, which he had paid, and therefore insisted to retain to pay himself out of the dollars. Mr. Attorney Jones said the partnership was long surrendered (I think he said fourteen years) in all which time we have nothing to do with A. and the 500 dollars is paid only to our use, and no relation to the partnership. And the covenant to save harmless is no debt, but only rests in damages. And to the sentence in law we are no party, nor ever acquainted with it. And by what evidence or faint defence made by A. the sentence was given we know not. And it is more probable when A. had his money in our hands he on design to pay himself out of our money in his hands made faint or no defence. And it is improbable that the Duke's officers should be so long negligent of the dues to the Duke, and the plaintiff should have given notice to the defendant. Ld. Chancellor said, whether the bill of exchange was before or after the sentence does not appear. Mr. Attorney objected, that this is like a foreign attachment to pay what is due on one account, or occasion out of another; and the money is not due from C. only. but also from B. till at last it was answered, that C's covenant extends

tends to all which A's part suffered, and decreed accordingly. Chan. Cafes 311, 312. Hill. 30 & 31 Car. 2. Gold v. Canham.

17. In respect of a *company* stoppage is allowed to be as good as payment; for it is the custom of companies, that if they owe a man 100l. they will give him credit for so much; per Ld. Keeper North. * Vern. 122. pl. 112. Hill. 1682. in case of Cuuson v. the African company.

The reason is the same and the law must be so too, though there is no instance of it. 18. Where an heir is a *creditor by bond* or judgment quære, if he shall not retain? the reason being the same in the case of an heir as it is of an executor; for neither can sue himself. See 2 Vern. R. 62. pl. 54. Pasch. 1688. in case of Sawley v. Gower.

19. B. was indebted to A. A. dies leaving two children C. and D. B. takes C. and D. *to board* with him; the executors of A. shall discount the debt due from B. with the executor of B. though it was a debt due by simple contract, and the payment of the discount shall be no *devastavit* in B's executor, if there should be any debts or bonds owing to B. and be afterwards put in suit against him, because the discount was made *for the necessary support of infants*, and this court will protect him against any judgment at law on a *devastavit*. N. Ch. R. 159. Hill. 1 W. & M. Berriſſe v. Berriſſe.

20. Covenant to save the lessee harmless from a *rent charge*; if lessee pays it *without compulsion*, he pays it in his own wrong and must pay it again to the lessor; but if he is distrained for the rent charge and his goods taken, this is a breach of the covenant and not before. 3 Salk. 109. pl. 9. Mich. 9 W. 3. B. R. Hannam v. Redman.

21. An *executor sells a term to a creditor*, and agreed that the creditor should discount his debt out of the purchase money. But on a bill by the other creditors, he was decreed to pay all the money because he purchased with full notice that it was a testamentary estate, and nothing came into the executor's hands as an equivalent for it to make up the quantum of the testator's assets. Cited Ch. Prec. 434. pl. 283. Hill. 1715. in case of Paget v. Hoskins, as decreed in a case when Ld. C. Cowper was Ld. Chancellor before.

22. A. and B. one a clothier and the other a dyer had carried on a trade betwixt them several years by setting off the money due. B. died intestate and indebted to several persons by bond, who *take out administration as principal creditors* and sue A. at law. On a bill by A. Ld. Macclesfield thought that *carrying on a mutual trade several years by setting off and not paying money on either side* was a strong presumption of an agreement for that purpose and that otherwise they would not so long have continued their dealings; that it was the constant use between merchants and traders; and decreed that A. should be allowed on discount what was due to him from B. Ch. Prec. 580. pl. 350. Hill. 1721. Downam v. Matthews.

23. If there be but *the least handle to direct an account* so as to set off the other's debts it ought to be done; as if even in case of *bond the interest* had not been paid, but *cast up and allowed in goods* this would intitle them to retain the whole against each as the account should come out; per Ld. Macclesfield. Ch. Prec. 580. Hill. 1721. in case of Downam v. Mathews.

24. A man cannot stop his *rent* for money due to him on a *bond* towards satisfaction of a *simple-contract-debt*; per Ld. Macclesfield. Ch. Prec. 582. pl. 350. Hill. 1721, in case of Downam v. Matthews.

25. A. took a nephew upon his father's death into his house and provided him with cloaths and schooling, and afterwards took him as apprentice, and in his books kept an account of expences for that and board, but from the time of the apprenticeship omitted the board, and afterwards left him 500 l. by his will, and made B. executor; after A's death B. supplied the nephew with wines who likewise received monies due to B. and so became indebted to B. considerably. The nephew sued B. in the Spiritual Court for the 500 l. Upon a bill brought in Chancery by B. first against the nephew and after against the assignees of a commission of bankruptcy against the nephew and cross bill by them against B. the Master of the Rolls said, that it was true that stoppage was no payment at law, nor is it so of itself in equity; but then a very slender agreement for discounting the one debt out of the other will make it a payment, because it prevents multiplicity of suits, and decreed an account and the plaintiff B. to pay only the surplus after having deducted what is due from the nephew as well to himself as to the testator, but no costs on either side. 2 Wms's Rep. 128. Pasch. 1723. Jeffs v. Wood.

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26. The plaintiffs were sugar bakers at Bristol, and Fry the intestate was a grocer there and bought sugars of them, and they bought blue papers of him for their sugars; plaintiffs were indebted to the intestate 30 l. for paper, and the intestate was indebted to them 100 l. for sugars. Intestate died insolvent not leaving assets to pay his debts, defendant Freeman takes out administration as principal creditor, and brings an action at law, against Lane one of the plaintiffs and partners for goods sold and delivered to him by the intestate, and gets a verdict at law and judgment thereupon. Plaintiffs bring the bill, suggesting that the intestate was indebted to them as partners in a far greater sum for goods sold and delivered, than they were indebted to him, and pray an account, and that deducting the debt due by them to the intestate they may have satisfaction for the balance of the account out of assets.

MS. Rep.
Mich. 10.
in Canc.
Hawkins
& al.
v. Freeman.

Defendant insists upon the verdict at law against Lane for goods sold and delivered to him upon his own separate account, and that if those goods were sold upon the partnership account Lane had a good defence at law in the action brought against him alone, and since he did not take the advantage of it at law, he ought not to be aided in a court of equity; that here was not any proof of an agreement to set one debt against another, and without such agreement stoppage is no payment either in law or equity.

It was argued for the plaintiffs that it is reasonable in mutual dealings among tradesmen, that one debt should be set against another, both debts being of an equal nature, and that a very little evidence will be sufficient to shew the intent of the parties, that it should be so, and cited the case of *DOWNAM AND MATTHEWS* in *Canc. Hill. 8 Geo.* to that purpose, that here was evidence that the plaintiffs having sent to the intestate for the money he owed them, the intestate sold them blue paper, and then said surely they would let him alone now for some time longer, since he had sold them the paper, which shews plainly that he understood the value of the paper was to go in discount of part of the debt due to them; that there were no witnesses examined for Lane in the action brought against him so the merits not tried, and this verdict against Lane could not exclude the rest of the partners from their equity against the defendant; if that judgment should stand the plaintiffs would be obliged to pay 30*l.* to the intestate's estate, when at the same time his estate was indebted to them 100*l.* and no assets to pay them, so the plaintiffs would not only be stripped entirely of their demands but pay 30*l.* towards satisfying other creditors demands.

Macclesfield C. In mutual dealings between tradesmen it is reasonable to suppose they intend one debt should be set against the other, and the balance only to be paid as it is per statute of bankrupts, and therefore the least evidence of such an intent is sufficient. Here is sufficient proof of such intent between the parties, and though I shall be tender of relieving in this court after a verdict at law, yet in the present case, the verdict is not material, for it appears in the cause that the sugars were part of the joint stock and per contra the paper was delivered to the use of the joint-trade and not bought by Lane for his separate use, and though Lane was the acting partner, and agreed for the paper, yet it was bought and employed in the joint trade, and though the verdict was against him singly yet he is but in nature of a trustee for the other partners, and the case is the same in equity, as if all the partners had actually bought the paper, since it was bought for their use and upon their account.

Decreed that the defendant acknowledge satisfaction upon the judgment, and that an account be taken between the parties and the balance due to plaintiffs be paid in a course of administration, but without costs, because the defendant is an administrator.

N. B. This was an appeal from the Rolls, where the bill was dismissed, that decree now reversed and decreed ut supra.

See pl. 34.

27. 2 Geo. 2 cap. 22. *Where there are mutual debts between the plaintiff and defendant, or if either party sue or be sued, as executor or administrator, where there are mutual debts between testator or intestate and either party, one debt may be set against the other, and such matter may be given in evidence upon the general issue, or pleaded in bar, as the nature of the case shall require, so as at the time of pleading the general issue, where such debt is intended to be looked upon in evidence, notice shall be given of the particular sum or debt, so intended to be insisted upon, and on what account it became due,*

due, or otherwise such matter shall not be allowed in evidence on the general issue.

28. Where a person who had stock in a company was indebted to the company, and there was an express *by-law* to subject the stock of each member to satisfy the debts they should owe to the company, in such case the company may stop to pay themselves. Abr. Equ. Cases 9. cited as decreed per Ld. Macclesfield assisted per Raymond Ch. J. and Price J. in the case of Hudson's Bay Company.

But where there was no such by-law, and a member of a company and who was one of the directors thereof,

borrowed money of the company, but not on the security of the stock, and afterwards became bankrupt, and it was insisted that by statute of 5 Geo. 1. one account was to be set off against another. But this was held not to be within that statute which speaks only of mutual dealings and accounts, which is not this case, as the bankrupt had a *joint permanent interest* in the stock, and the money borrowed with regard thereto. And the court held, that the loan in the present case to the bankrupt was not in their corporate capacity wherein only he stood related to them, and held his stock, but was a loan by them as *private persons*, for which they could not stop his stock, which he held as a member of the company in their corporate capacity. Trin. 1728. Abr. Equ. Cases. 9. between Meliorucchi v. Royal Exchange Assurance Company.

* This seems misprinted for 5 Geo. 2. cap. 30. s. 28.

29. And it was resembled to the case of the lord of a manor and his copyholders, that the lord could not refuse to admit a person to whom one of the copyholders had sold his estate on account of any debt due to the lord by that copyholder, that as the lord of the manor in that case, though he had the freehold of all the copyhold estates in him, yet he had no right to any of the copyholders private copyhold. Abr. Equ. Cases 8. Trin. 1728. Meliorucchi v. the Royal Exchange Company.

30. It was held, that where a plaintiff is executor, the debt set off against his demand must be of an equal nature; that is a specialty against a specialty; but not a simple contract against a specialty; because a different construction of the statute might occasion a *devastavit*. Trin. 6 Geo. 2. Kemys v. Betson.

S. C. cited Trin. 14 & 15 Geo. 2. in C. B. in the case of Hutchen-son v. Stur-

ges, the court said, that this being before the statute 8 Geo. 2 was a right determination, but not for the reason given. For how could any construction make a *devastavit*? But if a statute says or means, that a simple contract may be set off against a specialty, surely that would be a good justification for the executor. * But the true reason arises from the design of the act, which was to prevent circuitry of action, and the necessity for bills in chancery. For before the act, if a man sued me for a less sum than he owed, I could have no relief but in chancery: therefore it was the design of the act to give the defendant in such case the same advantage; as if he had brought another cross action for his demand. Now in the case of an executor, if he sues a common person upon a bond given to the testator, he must recover; whereas if the defendant was to sue him upon a simple contract of the testator, he might possibly not recover, upon account of superior debts. Therefore as the statute intended to give a defendant the same, but not a greater advantage, he ought not to be allowed to set it off. For the same reason a debt barred by the statute of limitations cannot be pleaded or set off, though it remains a debt; because, if an action had been brought for it, the statute might have been pleaded in bar.

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31. In an action of debt upon bond the defendant pleads that the plaintiff was indebted to him by simple contract, more than the sum mentioned in the condition of the bond. But upon demurrer to the plea there was judgment for the plaintiff; for that a simple contract could not be pleaded, or given in evidence by way of set off to an action upon a bond. Mich. 6 Geo. 2. C. B. Stephens v. Loftyn.

S. C. cited Trin. 14 & 15 Geo. 2. in C. B. in the case of Hutchen-son v. Sturges. The court said, that the

reason the court went upon was, that the same words of the same act of parliament ought to receive

receive the same construction, and therefore as it has been so determined in the case of executors, it ought to be so in the case of common persons. But surely where the *same words of an act* are referable to different things, there ought to be *different constructions* made according to the different natures of the things. Now the case of a common person plaintiff does not stand upon the same reason as that of a plaintiff executor. For if the executor was to be sued upon a simple contract, there might possibly be no recovery against him. But if the common person plaintiff was to be sued, there must always be a recovery against him, whether the debt be by specialty or simple contract; and therefore in such case it seems to be a good set off against the bond debt. Accordingly when the case went up into the King's Bench, the court were of this opinion, and would have reversed the judgment of the common pleas; but for this reason, that *before the act of 8 Geo. 2. the penalty at law was the debt*; and in that case the debt pleaded as a set off was not so much as the penalty of the bond, though more than was due by the condition of the bond, and therefore they affirmed the judgment.

This action
(ut audiui)
was
brought by
an admini-
stratrix.

32. *Debt for rent upon a parol lease*; defendant had by his *plea set off a debt by simple contract*; to which plaintiff demurred. Per Cur. a debt of an inferior nature cannot be set off against a superior demand. Judgment for the plaintiff, debt for rent is equal to an action upon a bond. Barnes notes in C. B. 199. East. 7 G. 2. Brown v. Holyoak.

33. The Ch. Justice and Probyn J. thought that a debt by *simple contract* might be set against a debt by bond. 'Page J. was of a contrary opinion, and Lec J. gave no opinion as to this point at all. 2 Barnard. Rep. in B. R. 338. Mich. 7 Geo. 2. Stephens v. Lofly.

Quere
Trin. 11 &
12 Geo. 2.
Calborough
v. Mackna-
mara, the
plea held
not good on
demurrer it
not setting
forth partic-
ularly how
much due.

34. 8. Geo. 2. cap. 1. makes the act of 2 Geo. 2. for setting mutual debts one against another, either by being pleaded in bar or given in evidence on the general issue in the manner therein mentioned, notwithstanding such debts are deemed in law to be of a different nature, perpetual, unless in cases where either of the said debts shall accrue by reason of a penalty contained in any bond or specialty; and in all cases where either the debt for which the action hath been or shall be brought, or the debt intended to be set against the same hath accrued or shall accrue by reason of any such penalty, the debt intended to be set off shall be pleaded in bar, in which plea shall be shewn how much is truly and justly due on either side, and in case the plaintiff shall recover in any such action or suit, judgment shall be entered for no more than shall appear to be truly and justly due after one debt being set out against the other as aforesaid.

S. C. cited
Trin. 14 &
15 Geo. 2.
in case of
Hutchen-
son v. Stur-
ges, but the
court said, the
case of King's
Bench held it
might, and the
Ch. Justice
said, there could
be no danger
of a *devastavit*
from such a
construction,
but the act of
parliament
would be a
sufficient
justification.
And either at
that time the
statute of the
8 Geo. 2. had
passed, or
immediately
followed, which
took away all
doubts.

35. In debt for rent brought by an administratrix upon a lease by parol the defendant would have set off a simple contract debt; but the court held, that the plaintiff's demand being equal to a bond or specialty, a debt by simple contract could not be set off against it. Palsch. 8 Geo. 2. C. B. Brown v. Holyoak.

[563]

Ibid. 200.
S. C. the
court held,
that the
evidence
offered to

36. Covenant was brought upon indenture for non-payment of rent. Defendant pleaded *non est factum*, and gave notice upon his plea to set off several sums due to him upon covenants in the same deed, for spurring up land at a certain sum per acre. The question was, whether upon this plea defendant could give in evidence his demand, by virtue of the late act of parliament. Mr. Justice Den-
ton,

son, who tried the cause at the last assizes for Suffolk, being of opinion he could not upon this issue. It was urged for defendant, that his debt is a certain demand, for which he might have brought an action of debt, and that the debts are mutual of the same nature and degree, and both debts arise upon the same contract; that the plea is a general issue, and that thereupon a bond might have been set off against a bond; and therefore this is a case within the nature and meaning of the act. On the other side, it was insisted, that defendant's plea is intirely inconsistent; he denies the deed, and at the same time makes a demand under it; he might have pleaded a general issue without denying the deed, or might have pleaded the matter specially; that the court upon motions to plead double, never give leave to plead contradictory matters. Cur. advis. Barnes's notes in C. B. 199. Mich. 8 Geo. 2 Gower & Ux. v. Hunt.

be given by defendant ought to have been received at the trial, being to set off a certain debt of equal degree with the plaintiff's demand; the general issue must be understood to be any general issue. A new trial was ordered.

37. *Plea delivered in the country held to be bad, though with notice to set off a mutual debt, which notice must necessarily be proved at the assizes by the person that delivered it, with the plea; but the plea being delivered the first day of last term, and the country attornies both living in the same town, the judgment was set aside, and costs were ordered to attend the event of the trial.* Barnes's notes in C. B. 177. Trin. 8 & 9 Geo. 2. Taylor v. Lawson.

38. The plaintiff's husband to whom she was executrix, had by letter of attorney appointed the defendant his steward; the defendant received of the tenants several sums of money for rent after the testator's death. The plaintiff brought this action in her own name, and not as executrix, for the money so received, as received to her use; notice was given to set off against the plaintiff's demands certain sums that were due from the testator to the defendant; but at the trial the defendant was not admitted to set off what was due from the testator to him, because the plaintiff had not declared as executrix, but in her own right. This was a case reserved at Lincoln assizes for the opinion of the court on the construction of the statute 2 Geo. 2. cap. 22. s. 11. Per Cur. the plaintiff must have the benefit of her verdict. Cases of Pract. in C. B. 151. Trin. 11 & 12 Geo. 2. Shipman v. Thompion.

39. *A. by bill against B. prayed relief and a discovery, and proceeded in an action at law upon the same account. B. applied to the court that plaintiff would make his election which court to proceed in. A. elected to proceed at law, but had leave to proceed here likewise, as to so much of his bill as sought a discovery. A. amended his bill on payment of costs, by striking out that part which tended to pray relief. Thereupon the bill was dismissed of course, because it prayed only a discovery, and the costs to B. taxed at 38 l. But A. got judgment at law, and damages and costs, to 440 l. for which B. was taken in execution and lay in custody, but at the same time took out an attachment against A. for the costs in this court. Upon a petition by A. praying he might deduct the 38 l. costs incurred here out of the 440 l. recovered against the defendant at law, Ld. Chancellor said, the petition seemed very reasonable,*

able, and that he would grant it if the precedents of the court justify it, which yet he doubted, because the bill of discovery was dismissed out of court; and so would make no order, but directed it * to stand over, that the plaintiff might *search for precedents*. Barnard. Rep. in Chan. 428. Hill. 1740. Geerish v. Donaccon.

40. In *debt on bond* the declaration set forth that defendant became bound to the plaintiff, being one of the bearers of the verge of the King's court of the Marshalsea, and an officer of the King's household, *in the sum of 8 l.* defendant pleads, *that the plaintiff is indebted to him several sums, (by simple contract) amounting in the whole to 25 l.* which is due and unpaid, and is sufficient to satisfy and discharge the plaintiff's demand of 8 l. The plaintiff prays, that the condition of the bond may be inrolled; which being done, it appeared to be a *bond for defendant's appearance to an action brought in the Marshalsea Court by a third person*. The plaintiff demurs, and upon joinder in demurrer the question was, whether the debts set forth in defendant's plea, could be set off against the plaintiff's demand. And the court held they could not; for *the statute 8 Geo. 2.* which allows the setting off simple contracts against bond debts, appears plainly to *relate only to bonds conditioned for payment of money*; whereas this is a bond for the parties appearance at the suit of a third person; and though it was given to *the officer*, and (being not assignable), the action brought upon it must be in his name, yet he is *only a trustee for the real plaintiff, and does not sue in his own right*. The case is the same, as if *one was to sue as executor*, and defendant was to set off a debt which the executor owed him in his own right, which would certainly be ill. If it was otherwise, there would be an end of all such bail bonds, which are taken for the furtherance of justice; for then, wherever the officer who takes the bond, happens to owe defendant money, the plaintiff's suit must be rendered ineffectual. The court therefore disallowed the plea, and the plaintiff had judgment. Trin. 14 & 15 Geo. 2. C. B. Hutchenfon v. Sturges.

For more of Discount in general, see other proper Titles.

* Dismes, [or Tithes.]

Fol. 635.

* Tithes are an ecclesiastical inheritance, collateral to the estate of the lands and of their proper nature due only to ecclesiastical

(A) *Predial.*

[What shall be said to be Predial Tithes.]

[1. **CORN** is a predial tythe, though it comes in part of the industry of man, and part of the ground. Mich. 8 Jac. B. Co. Magna Charta 649.]

persons by the ecclesiastical law, and therefore no unity of possession can extinguish or suspend them, but that notwithstanding any unity they remain, so that they may be demised or granted to any spiritual man, notwithstanding any such suspension; per Cur. 11 Rep. 13. b. Mich. 10 Jac. C. B. in case of Priddle v. Napper.

[2. *Pigs* are *predial mixed*. Mich. 8 Jac B.]

[3. *So wool and lamb* are predial mixed. Mich. 8 Jac. B.]

[4. *Vinum* is a predial tythe. Co. Magna Charta 649.]

[5. *Linum & canabum* is a predial tythe. Co. Magna Charta 649.]

[6. *Canabum* is a predial tythe. Co. Magna Charta 649.]

[7. *Hops* are properly predial tithes. Mich. 8 Jac. B.]

[8. Those that come from the fruits of the earth, as *poma, pira, pruna, volema*, and *fructus hortorum*, and *masts of oak and beech* are predial tythes, Co. Magna Charta 649.]

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(B) *Mixed.*^a

[1. **MIXED** tythes are those that come of *cheese, milk, &c.* or *ex foetibus animalium quæ sunt in pascuis & gregatim pascuntur, ut in agnis, vitulis, hædis, capreolis, pullis, &c.* Co. Magna Charta 649.]

[2. Tithes of *pigs* are mixed tithes. Mich. 8. Jac. B.]

[3. *Wool and lamb* are mixed tithes. Mich. 8. Jac. B.]

Agreed that wool and lamb are included within small tithes. Poph. 44. Trin. 16 Jac. in case of Nicholas v. Ward.

[4. Tythes of *cheese, calves, and lambs* are mixed tythes. Co. Magna Charta 649. adjudged.]

(C) Of what Things [Animals] they shall be paid *de jure*.

Cro. C. 559. pl. 2. S. C. & S. P. as to honey. [1. TITHES ought to be paid in kind *de jure*, of wax and honey of bees in an hive. Mich. 15 Car. B. R. between Barefoot and Norton, adjudged in a prohibition upon a demurrer, and a consultation granted,] Jo. 447. pl. 10. S. C. as to tithes of honey.—F. N. B. 51. (G) as to honey and wax.

* See (6) pl. 5. S. C. [2. Tithes shall be paid *de jure* of young pigeons. Mich. 14 Jac. B. between * Whately and Hanbury, resolved. Hill. 15 Jac. B. R. resolved, and a prohibition denied in one † Gastrell's case of the Inner Temple,] (Z) pl. 4. 5. S. C. — See † 2 Roll.

Rep. 2. Jones v. Gastrell. S. C. accordingly. — If they were spent by the owner in his house no tithes shall be paid of them. Litt. Rep. 321. Mich. 5 Car. C. B. Flower v. Vaughan. — Hotl. 147. S. C. & S. P. — Litt. Rep. 40. Trin. 3 Car. C. B. S. P. — Doves in a dove-house may pay tithes by custom. Vent. 5 Hill. 20 & 21 Car. 2. B. R. Anon. — Prohibition to the Spiritual Court for tithes-pigeons on suggestion that they were spent in the house. Holt doubted. 12 Mod. 47. Mich. 5 W. & M. Badgerley v. Wood.

No tithes are payable of conies in a warren; and Ley Ch. J. said, that the warrener cannot call them cuniculos suos, and it is not felony to take them; for that he [3. No tithes *de jure* without a custom ought to be paid for conies, because they are *feræ naturæ*. Trin. 8 Car. B. R. between Worden and Benet, after a prohibition granted, a consultation denied per Curiam for the cause aforesaid. P. 13. Car. B. R. between Sir John Bruen and Dr. Bradish per curiam, and a prohibition granted accordingly. Hill. 13 Car. B. between Vincent and Tutt a prohibition granted, and for a prohibition pleaded by the parson to have them by prescription. Mich. 14 Car. B. * Regis, between Williams and Wilcox, a prohibition granted. Mich. 15 Car. B. R. between Dampport and Onge a prohibition granted,]

has no property in the old conies, but that the better question is, if the parson should have tithes of the sucklings, and a prohibition was awarded. 2 Roll. Rep. 458. Trin. 22 Jac. B. R. Haies alias Hawes's case. — Tithes ought to be paid for conies; per Doderidge J. to which the court assented. 2 Roll. Rep. 2. Hill. 15 Jac. in case of Jones v. Gastrell. — A suit was in the Spiritual Court for tithes of conies in a warren, but it being suggested that it was without a special custom a prohibition was granted per tot. Cur. the court having proceeded only on a libel. Keb. 6cs. pl. 77. Mich. 15 Car. 2. B. R. Towerion v. Winger. — 2 Keb. 140, 141. pl. 10. Hill. 18 & 19 Car. 2. B. R. Webb v. Newman. S. P. — S. P. by Richardson cited to have been agreed. Litt. Rep. 13. — The demand of tithes of conies is against common right; admitted per Cur. Hord. 188. Pasch. 13 Car. 2. in Scacc. Randal v. Head. — 2 Mod. 77. S. P. obiter. Pasch. 28 Car. 2. — Vent. 5. Hill. 21 & 22 Car. 2. B. R. Anon. that a warren may pay tithes by custom. — Conies are not tithable unless by custom; per Berkley J. Mar. 56. pl. 87. Mich. 15 Car. Anon.

* [566] [4. No tithes *de jure* are to be paid for *fish taken in a common river*. Pasch. 5 Car. B. R. a prohibition granted to stay a suit for tithes of eels taken in a common river within the parish of Barton in Westmorland; and Hill. 9 Car. a prohibition was granted to stay a suit * for tithes of trouts in the same river; but the court seemed to be divided whether tithes were due or not, but they

Cro C. 339. pl. 2. S. P. and seems to be S. C.

* Fo. 436.

they granted a prohibition, for that the law should be decided thereupon, and this was between Dawes and Huddleston.] But no resolution. But Rich-ardson said, that peradventure it may be by custom, otherwise tithes are not payable for fish taken in rivers. Vent. 5 Hill. 20 & 21 Car. 2. B. R. that by custom tithes may be paid of fish in a river. Fish in a river are not tithable unless by custom. Mar. 17. pl. 41. Pasch. 15 Car. 1. Anon.

[5. If a man hath pheasants, and keeps them within an inclosed wood, and clips the wings of the pheasants, and from the eggs hatches and brings up young pheasants, no tithes shall be paid of these eggs or young pheasants, because they are not reclaimed, but continue *feræ naturæ*, and would go out of the inclosure if their wings were not clipped. Mich. 11 Car. B. R. between Winbroke and Evans, a prohibition was granted; but it was furnished that no tithe was paid for them in a great circuit called the Chilterme in the same county, scilicet of Bucks, and so prescribed in non decimando; but the court granted it because they were *feræ naturæ*.] A prohibition was granted upon a surmise that the custom was that tithes should not be paid of pheasants. Mar. 26. in pl. 59. Pasch. 15 Car. B. R. Anon.

[6. No tithes shall be paid in kind, without a custom, for fish taken in the high sea out of any parish. Hill. 14 Car. B. R. between Long and Dircel, per Curiam, and a prohibition granted accordingly; and Justice Jones said, that upon an appeal to the delegates out of Ireland in the Lord * Desmond's case it was agreed, that for such fish so taken, only personal tithes are due, deductis expensis.] Libel, &c. for tithes of pilchards taken in the sea; the defendant furnished a custom, &c.

for the owner of the fisher-boat to have one moiety of the fish and the fishermen the other moiety and that the owner used to pay the 10th of his moiety to the parson, in discharge of all tithes of fish, &c. The court held it a good suggestion, because at common law no tithes are due for fish taken in the sea, it not being within any parish; and therefore when the parson by the custom ought to have the tithes of them, he ought to take them according to the custom; and that the tenth of a moiety may be a good discharge of the whole. Noy. 108. Mich. 44 & 45 Eliz. Holland v. Hele.

Cro. C. 264. pl. 12. Trin. 8 Car. seems to be S. C. of Ld. Desmond and the suggestions were, because fish in the sea or great rivers are *feræ naturæ*, and not titheable. Secondly, Because the sea is not within any parish, so as no spiritual person can say it is within his parish where the fish is taken, but the prohibition was denied; for tithes of fishes are usually paid in Ireland, as Jones affirmed.

In prohibition the court held, that tithes of fish caught in the sea are not due without a custom, and therefore a custom to pay less than a tenth part may be good. 1 Lev. 179. Pasch. 18 Car. 2. B. R. in case of Sheppard v. Penrose. 2 Keb. 2. pl. 4. S. P. in S. C. Sid. 278. pl. 2. S. P. in S. C. See (S) pl. 4.

†[567]

[7. No tithes shall be paid in kind de jure, without a custom, for fish taken in a common river which is not inclosed, as in a stew inclosed, because they are in *feræ naturæ* though they are taken by one that hath a several fishery there, and though the place where they are taken be within the parish of that parson that claims them, for this is a personal tithe, in which tithes ought to be paid deductis expensis. Pasch. 15 Car. B. R. between Gold and Arthur, and others, a prohibition granted, where the suit was for the tithes of salmons in the river of Exe. Mich. 15 Car. B. R. between Wislake and the said Arthur and others, a like prohibition granted upon the same matter between other parties.] A parson libelled for tithes of fish, and the parish prayed a prohibition because they are *feræ naturæ* but the court did not grant it; because in

many places fish are tithable, as salmons in the river of Exeter, and herrings in Yarmouth. Palm. 527. Hill. 3 Car. B. R. Anon. S. P. cited Cro. C. 264. in pl. 12. Trin. 8 Car. B. R. Anon. And that they pay them to the parson of the parish where they are landed. Cro.

Cro. C. 339. Hill. 9 Car. B. R. Richardson said, that in Yarmouth was a suit for tithes of herrings taken in the sea, but they could not prevail. Jones said, that in his country of Wales they used to pay tithes for herrings; and in Ireland it is a common course to pay tithes of salmon taken in rivers. Richardson said that that peradventure, may be by custom; otherwise tithes be not payable for fishes taken in rivers.

S. C. cited
but the
Master of
the Rolls

8. Not of turkies or their eggs, nor of *tame partridges* or *pheasants*, because *feræ naturæ*. Mo. 599. pl. 822. Mich. 37 Eliz. Hugton v. Price.

But by
custom
tithes may
be paid
of them and

9. *Fish* and *rabbits* are customary tithes merely, of which no tithes are due by the law of the land; per Henden Serj. Arg. Het. 13. Pasch. 3 Car. C. B.

of them and so of doves in a dove-house. Vent. 5. Hill. 20 & 21 Car. 2. B. R. Anon.

10. A decree for tithe *conies*, and tithe wood. Toth. 284. cites Shires v. Burgoine. 12 Car.

(D) and
(E) should
have been
but one
letter.

(D) For what Things they shall be paid de Jure.
Of Freehold.

[1. NO tithes shall be paid for such things as do not grow and renew from year to year by the act of God. Co. 11. Dr. Grant 16.]

See (S) pl.
1. 2.

[2. No tithes ought to be paid de jure for houses of habitation. Co. 11. Dr. Grant 16.]

Libel for
tithes of a
house in

[3. Nor for any rent reserved upon a demise made of houses of habitation. Co. 11. Dr. Grant 16.]

London: the defendant, suggested, that the house, &c. was formerly a priory, which was discharged from payment of tithes by a bull, &c. and that it is enacted by the statute 31 H. 8. by which the possessions, &c. were given to the crown, that the king and his patentees should hold the same discharged of tithes in the same manner as the priors, &c. but a consultation was awarded, because the later statute 37 H. 8. c. 13. ordains that all houses in London shall pay tithes according to their ordinances there, and so that statute extends to all houses, except those of noblemen which are excepted. Mo. 912. pl. 1286. Pasch. 33 Eliz. B. R. Green v. Pipe. — Cru. E. 276. pl. 6. S. C. adjudged accordingly. — It appears by Linwood de Decimis that tithes were payable in London for houses before the said act of 37 H. 8. but the quota was doubtful, which is remedied by the said act and decree made thereupon. Hard. 116. Trin. 1658. Scacc. Langham v. Baker, & al'.

Parson sued for 2 s. 9 d. per pound for tithes for houses in London according to 37 H. 8. An issue was directed to try, whether less than that sum had ever been paid, although no proof that there had been any regular modus. MS. Tab. Feb. 22, 1722. Bennet v. Trespass.

Of the custom of paying tithes of houses in London and of the statute and decree of 37 H. 8. Vide G. Equ. R. 191. Mich. 12 Geo. in Scacc. Bennet v. Trespass, Becket and Whitehall.

* [568]

This in
Pryn's
Abr. of Cot-
ton's Re-
cords is 5
H. 4. nu-
mero 63.

[4. 5 H. 4. Rotulo parliamenti, numero 66. the commons pray, that whereas many of the lieges of the king are often vexed and troubled by parsons and vicars of holy church by citations and censure of holy church; for tithes of stone and slate worked and drawn out of quarries, of which no tithes are paid, that he would please to

so grant, that if any prohibition be made in the case, that no consultation be granted to the contrary.]

(E) Answer. The King will advise.

Fol. 637.

- [1. NO tithes shall be paid of *quarries*, because they are part of the freehold. Hill. 11 Jac. B. R. per Curiam.]
 [2. No tithes shall be paid de jure for *coal*. Hill. 14 Jac. B. R. per Houghton.]

This is printed here as in the original. — Referred that no

tithes are due of flates, nor quarries of slate or cole. Mo. 908. pl. 1275. Pasch. 34 Eliz. B. R. Lyb v. Watts. — For the parson may have the tithes of the grafs and the corn growing on the surface where the quarry is. Cro. E. 277. Lyffe v. Watts. S. C. — Br. Dismes, pl. 18. S. P. cites the Register. — S. P. by Richardson. Litt. Rep. 447. Pasch. 4 Car. C. B. — S. P. as to quarries; per Jones and Berkley. Mar. 58. pl. 89. Mich. 15 Car. obiter. — *Gravel and chalk* are part of the freehold and not tithable. Mod. 35. pl. 84. Hill. 21 & 22 Car. 2. B. R.

- [3. So no tithe shall be paid for *turf* which is to burn. Hill. 14 Ja. B. R. per Houghton. Hill. 11 Ja. Br. per Curiam.]

not tithable. Mod. 35. l. 84. Hill. 21 & 22 Car. 2. B. R. Anon.

[4. 33 E. 1. Libro parliamentorum 105. de parsonis & vicariis petentibus decimam in Cornubia, ubi rex solvit annuatim episcopo Exoniz pro decima prædicta. Ita responsum. Fiat sicut fieri consuevit tempore comitis & regis; and over this is writ, STAGMEN CORNUBIZ, it seemed intended tithes *de Stanmo*. Vide Rotulo Parliamenti. 8 Ed. 2. Membrana 15.]

See pl. 8.

- [5. No tithes shall be paid of *lime*, because it is part of the freehold. Mich. 13 Jac. B. between Thomas and Perrie, per Curiam.]

S. P. by Richardson Litt. Rep. 147. Pasch. 4 Car. C. B.

It was agreed clearly that no tithes ought to be paid for *brick*, because it is part of the soil; and so it had been often adjudged. 2 Mod. 77. Pasch. 28 Car. 2. C. B. Stoutill's case. — A man shall not pay tithes for brick or clay; cited by Barkley J. to have been so adjudged. Mar. 58. Mich. 15 Car.

[6. If a man be seised of lands within a parish that used to pay tithes, and makes a *nursery* thereof for imps and plants of several kinds of fruit, as *apples, pears, plumbs, &c.* and of *asbes* and after sells several of them to strangers, out of the parish to be transplanted, he shall pay tithes of this nursery to the parson, for though the imps are part of the freehold so long as they continue * there, yet when they are transplanted, they are levered and taken from the freehold; and if this shall be permitted, the parson may be defeated of the tithes of all the land in his parish by making of it into nurseries. Hill. 14 Car. B. R. between Gibbs and Wiburn, adjudged per Curiam upon a demurrer and a consultation granted accordingly. Intratur, Mich. 14 Car. Rotulo 75.]

Cro. C. 526. pl. 5. S. C. accordingly. — Jo. 416. pl. 3. S. C. accordingly. per tot. Cur. — If they are sold and transplanted within the same parish, they shall pay tithe. Hard.

380. Mich. 16 Car. 2. in Scacc. Grant v. Hedding.

*[569]

[7. If

Mar. 58. pl. 39. and ibid. 64, 65. pl. 100. S. C. but it does not appear that any prohibition was granted.

[7. If a man cuts a coppice of wood, and thereof pays his tithes, and after, before any new germens grow, he grubs up the roots and stumps of trees, he shall not pay tithe of them, because they are parcel of the freehold, and not annually renewing. Mich. 15 Car. B. R. between Bedford and Dr. Skinner, per Curiam, and a prohibition granted accordingly.]

See pl. 4.

8. In Doderidge's History of the Dutchy of Cornwall, fol. 127. it is said that there is paid yearly to the Bishop of Exeter for the tenth of the coynage of *tynde* in Devon and Cornwall 16L 13s. 4d.

From (F) to (Q) should have been all one letter, but put here as in Roll.

(F) Tithe of Wood.

Frynn's Abr. of Cotton's Records 40. numero 51. same petition and answer.

[1. ROTULD Parliamenti 17 Ed. 3. numero 51. the *commons pray*, that no man be drawn in plea in court christian for tithes of wood or under-wood, *unless in such places where such tithes have used to be given.*]

Same Record cited 2 Roll Rep. 122. Mich. 17 Jac. B. R. in case of the Earle of Clanrickard v. Lady Denton. — Same petition and answer cited 2 Inst. 642.

(G) Answer.

[1. LET it be done of this as it hath used to be done before these days.]

Frynn's Abr. of Cotton's Records has nothing of this petition at number 12 or elsewhere in 18 E. 3. that I can observe.

[2. 18 Ed. 3. numero 12. the *commons pray*, That as a constitution is made by the prelates to take tythes of all manner of wood, which thing was never used, and that niefs and wives might make testaments, which is against reason, that it would please by him and his good council to ordain a remedy, and that his people should remain in the same state as they had used to be in the time of all his progenitors, and *that prohibitions should be granted* to all those who are impleaded of the tithes of wood *without having a consultation.*]

Palm. 38. Mich. 17 Jac. in arguing the case there it was said by Serjeant Henden, that originally tithe was not given to the clergy of wood before John Stratford archbishop of Canterbury 17 E. 7. made a constitution that tithes should be paid within his jurisdiction of *sylva cædua*, and that at the next parliament 18 E. 3. and at every parliament till 16 R. 2. the commonalty complained thereof.

* This is misprinted for (3.)

(H) Answer,

(H) Answer, the King will that Law and Reason be done. Fol. 638.

[1. 21 **E**D. 3. numero 48. The *commons prayed*, That whereas the arch-bishops and bishops had lately ordained a constitution to give tythes of *under-wood sold* only, whereas before these days no tithes were given; now the people of holy church, by force of the said constitution, take and demand tithes also of gross-wood, as well as of under-wood, sold and not sold, against what they have used time out of mind, to the great damage of the common law, of which they pray a remedy.]

Pryn's
Abr. of Cot-
ton's Re-
cords 60.
Number 48.
has the same
petition and
answer.

(I) Answer.

[1. **T**HE arch-bishop of Canterbury, and other bishops, have answered, That such tithe is not demanded by reason of the said constitution, but of under-wood.]

[2. 25 Ed. 3. 2. parte numero 37. the *commons prayed*, That no tithes shall be paid of wood, but where it hath used to be paid, and not of gross-wood.]

Pryn's
Abr. of Cot-
ton's Re-
cords 80.

number 37. same petition and the answer was, that the King will be advised.

(K) Answer. The King will advise.

[1. 43 Ed. 3. numero 17. The *commons prayed*, That it be declared in what case tithe of wood or under-wood ought to be given of right in places where it has not been given before these days; and also that it be put in certain what manner of wood ought to be called *silva cadua*; and that in case any be impleaded in court christian of tithe of wood or under-wood, that a *prohibition* be granted thereafter, and an *attachment* thereupon in Chancery, as well to the judges as parties, as is accustomed in other cases, without having a consultation.]

Pryn's
Abr. of Cot-
ton's Re-
cords 109.
number
117. The
petition
was, that
silva
cadua may
especially
be declared;

and the answer was, that the statute shall be observed.

(L) Answer

(L) Answer.

[1. LET the statute in this case ordained be kept and held.]

Prynn's
Abr. of Cot-
ton's Re-
cords 45.
E. 3. num-
ber 23. is a
petition as
to wool,
and I do
not observe
such peti-
tion there
as to wood
in that
year.

The com-
mon law is a prohibition in itself that a man shall not have tithes of great trees as of *sylva cædua*.
Es. Prohibition, pl. 1. cites 9 H. 6. by Paston, and says that so it appears elsewhere that the
statute 45 E. 3. which gives prohibition in this case gives it as it was used before, which proves
that prohibition was thereof at common law, and that this was usurped upon the common law.
—It is to be understood that this act uses these words, *grofs-boyes*, and that *haft-bois*, or
grand-bois, which word is also used in the books of 50 E. 3. and 9 H. 6. And in this act this
word (*grofs*) signified specially such wood as has been, or is, either by the common law or cus-
tom of the country, timber, for this act extends not to other woods, that have not been, or will
not serve for timber, though they be of the greatnes or bigness of timber. And it is to be ob-
served that the prohibition in 50 E. 3. for suing for tithes in court christian of *grofs-bois* was
grounded upon the common law, without mentioning of this act. 2 Inst. 642, 643.

Here it is to be demanded, to what kind of wood *grofs-bois* do extend? And the answer is, that
oak, *ash*, and *elm* are to be included within these words; and so is *beech*, *horse-beech*, and *horn-
beam*, because they serve for building or reparation of houses, mills, cottages, &c. against the
opinion in *Plowden Com.* fol. 470. in *Molyn's case*, holden without argument, which opinion
the whole court, upon deliberate advice, held to be no law. 2 Inst. 643.

(M) Answer.

This act is
only declara-
tory of the
common
law. 2 Inst. 642.

[1. LET there be a prohibition granted, and an attachment
thereupon, as hath been used before these days. Nota,
that upon this the statute is imprinted. 45 E. 3. cap. 3.]

* Fol. 639.
Prynn's
Abr. of Cot-
ton's Re-
cords 410.
number 59.
same peti-
tion and

[2. 2 H. 4. Rotuli Parlamenti numero 59. the commons in a
petition recited the statute of 45 E. 3. &c. and said, that notwith-
standing this (*) statute, parsons and vicars claiming tithes of all
manner of wood, as before they were wont, because that consulta-
tions in this case in Chancery have so easily been granted by colour
of this word *sylva cædua*, they pray, that he would please to or-
dain, that no consultation be granted by these words *sylva cædua*,
if it be so that the wood of which he claims tithes be of the age of
20 years

20 years or more at the time of the cutting, and a pain thereupon ^{same an-}swered in this present parliament.]

(N) Answer.

[1. L E T it be used as it hath been done before these days.]

[2. 2 H. 5. 2. parte numero 7. the *commons* prayed, That where- as they are often impleaded in court christian for tithe of gross- wood of the age of 20 years, and of 40 years and more, by the name of this word, *silva cædua*; and in the statute made in 45 Ed. 3. it is contained, that a prohibition be granted in this case, and thereupon an attachment, as it hath been used before these days, by which statute *no full declaration is made what wood is titheable, and what not*; wherefore the justices of the land are of several opi- nions concerning the said matter; that it please the Lord our King to limit and ordain, by the advice of the Lords of this present Parlia- ment, that all manner of wood, which is of the age of 20 years or more, shall not be titheable in any manner for the time to come; and if it be *within the age of 20 years*, it shall be titheable if the custom of the country, where such wood grows, demands it, and that in this case a prohibition be granted, and thereupon an at- tachment, without granting a consultation in this case.]

I do not ob- serve this petition in Pryn's Abr. of Cot- ton's Re- cords of this year.

(O) Answer.

[572]

[1. B ECAUSE the matter of the petition requires great and mature deliberation, the king's declaration will, that the matter aforesaid be adjourned and remitted to the next parliament, and that the clerk of the parliament cause this article to be brought before the King and his Lords at the beginning of the next Parlia- ment to have it there declared.]

2. 47 E. 3. numero 21. All the *commons* of the realm pray, That as at the last Parliament held at Winchester, the Lords and Commons of the land made their complaint, that parsons and vicars of the holy church travailed them in court christian for tithes of great wood, scilicet, of the age of 20 years and above, by colour of this word, *silva cædua*, at their request it was ordained, that no wood which was or should be of the age of 20 years and more, should be titheable; and the parsons of the holy church intending that this ordinance should not restrain them of their ancient in- croachment, surmising that this was not affirmed for a statute, * pur- sued in court christian contrary to the ordinance aforesaid, to the great damage of the people, that it would please the King to affirm the

Pryn's Abr. Cot- ton's Re- cords 118. number 21. same peti- tion and same an- swer.

* The ori- ginal is (font occasions en court.)

the said ordinance for a statute to endure for the time to come, and that a special prohibition upon the same statute should be made thereof in Chancery forbidding those of court christian to hold plea of tithes of wood of the age aforesaid.]

(P) Answer.

[1.] **L**ET there be such a prohibition granted as hath been of ancient time.]

Fol. 640. [2. Register, fol. 44. A consultation granted to the court christian to proceed there for tithes of *silva cadua*, so that *de grassis arboribus in hac parte non agatur.*]

Tithes shall be paid pro *silva cadua*, contra of great wood and timber. Br. Dismes, pl. 3. cites 50 E. 3. 10.— Br. Attachment for prohibition. Pl. 5. cites S. C.

(Q) Of what Things they shall be paid.

Litt. Rep. 148, 149. S. P. per Richardson. Pasch. 4. Car. C. B. [1.] **I**F a man tops oaks within the age of 20 years, and after leaves the top to grow above 20 years, no tithes shall be paid of them; for this is become timber. Mich. 10 Jac. B. per Coke.]
in the vicar of Wainsboroug h's case.

* Mo. 541. pl. 716. Mich. 39 & 40 Eliz. Holliday v. Lee. S. P. held accordingly. [2. If oaks above the age of 20 years become putrid and rotten, by which they are not fit for timber, yet no tithes shall be paid of them, because they were once privileged. Trin. 38 Eliz. B. R. between Parson * Ram v. Patterfon. Mich. 3 Jac. B. between † Brook and Rogers; per Curiam Co. 11.]
ingly †. Cro. E. 477. pl. 6. S. C. held accordingly by all the justices (Popham absente.)— Mo. 908. pl. 1272. Ranne v. Patison. S. C. & S. P. — Gouldsb. 145. pl. 61. S. C. held accordingly.

† Mo. 908. pl. 1273. Hill. 2 Jac. C. B. the S. C. and S. P. held accordingly; but if it be lopped before the tree is 20 years growth, and after that the tree is 20 years growth it be lopped every ten or seven years, tithes shall be paid of such lopps. — S. C. cited by Coke Ch. J. as adjudged. Roll. Rep. 100. — Cro. J. 100. pl. 31. S. C. & S. P. held by all.

‡ [573]

Tithes shall not be paid for trees or wood of the age of 20 years; per Askam, quod non. [3. If oaks above the age of 20 years have used to be topped and lopped within every 20 years, yet no tithes shall be paid of these tops and branches cut within their age of 20 years, because their stock is discharged. Trin. 38 Eliz. B. R. between Parson * Ram and Patterfon. Co. 11. between Sampson and Worthington, 48. b. adjudged.]

contradictur. Br. Dismes, pl. 4. cites 11 H. 4. 39. — S. P. if it be of the age of 20 years or above, by the statute of 45 E. 3. for it appears there that prohibition lay in this case before this statute. Br. Dismes, pl. 14. cites Dr. & Stud. lib. 2. — And a man shall not pay tithes for lopps nor frowds of such trees no more than of the tree itself. Br. Dismes, pl. 14. cites Dr. & Stud. lib. 2.

Cro. E. 477, 478. pl. 6. S. C. held accordingly, though afterwards they were lopped every seventh

seventh year. — Mo. 908. pl. 1272. S. C. & S. P. resolved. — S. P. by Richardson. Litt. Rep. 148, 149. Pasch. 4 Jac. C. B. in the vicar of Wainborough's case.

[4. If a man cuts down trees of timber, no tithes shall be paid for the *germins which grow ex radicibus* seu stipitibus, because the root is privileged. Co. 11. 48. b. Liford's case.]

Roll. Rep. 95. pl. 44. Stamp v. Clinton.

S. C. & Ibid. 100. S. P. by Coke Ch. J.

[5. Tithes shall be paid of *beeches* though they are *above the age of 20 years*, for they are not timber. Trin. 38 Eliz. cited in one Leonard's case the prothonotary to be so adjudged.]

Mo. 542. pl. 716. Mich. 39 & 40 Eliz.

S. P. held accordingly. Holliday v. Lee. — In a country where beech is reputed timber, as in Buckinghamshire, tithes shall not be paid for it, but in a plentiful country of wood it is otherwise; for there it is not timber, and tithes shall be paid for it. Brownl. 94. Pasch. 5 Jac. Man v. Somerton. — 2 Roll. Rep. 83. Pasch. 17 Jac. B. R. Anon. S. P. — 2 Inst. 643. S. P. against the opinion in Pl. Com. 470. in Molin's case, which the whole court upon deliberate advice held to be no law.

[6. [So] tithes shall be paid of *hazel, willows, holly, alder, and maple*, though they are above 20 years of age. Mich. 5 Jac. B. resolved, and a consultation granted accordingly.]

Cro. J. 199. pl. 29. Anon. S. P. held accordingly.

accordingly, and seems to be S. C. — Pl. Com. 470. b. Hill, 17 Eliz. in case of Soby v. Molyns. S. P. accordingly.

[7. No tithes shall be paid of *willows* in such countries where they are used for timber. Hobert's Reports, case 288.]

Hob. 219. pl. 289. says, a record

was shewn by serjeant Moor as Pasch. 14 Jac. Guffley v. Pindar. S. P. — Noy 30. Hill. 15 Jac. Pindar v. Spencer cites Guffley's case S. C. accordingly, and in the principal case it was suggested that hazel, holly, willow, white-thorne, &c. were used for timber to build and repair their plows, and a prohibition was awarded. And Hobart said, that in Cumberland beech was used for timber, and that the usage of the country for scarcity of other trees will alter the case,

[8. But if willows are felled which grow in the view of a house, though it be waste to fell them, yet tithes ought to be paid of them. Hobert's Reports, case 288.]

Hob. 219. pl. 289. in case of Guffley v. Pindar.

S. P. held by Hobart accordingly.

[9. If a man cuts *timber-trees*, no tithes shall be paid for the bark. Co. 11. Liford's case, 49.]

2 Inst. 643. cites S. C. & S. P. be-

cause * it is parcel of the tree, and does not renew de anno in annum. — Roll. Rep. 100. Stamp v. Clinton and Liford. S. C. and S. P. by Coke Ch. J. — Br. Dismes, pl. 14. cites Dr. & Stud. lib. 2. S. P.

*[574]

[10. Tithes shall be paid of *acorns* of oak, because this is an yearly increase. Co. 11. Liford's case, 49.]

2 Inst. 643. cites S. C. & S. P. — Mq.

762. pl. 1058. Trin. 2. Jac. B. R. in Reynold's case S. P. held accordingly. — Tithes shall be paid of *acorns*, but that is when they are gathered and sold. Litt. R. 40. Trin. 3 Car. C. B. Anon. Metl. 27. Anon. S. P. held accordingly.

[11. Of the *after-math*, scilicet, of the second math, tithes shall be paid de jure, without a special prescription to be discharged by the payment of tithes out of the first math, and then they shall be discharged. Pasch. 41 El. B. R. per curiam. Hill. 10 Jac. B. Parson of Stanfield in Suffolk, per Curiam, a prohibition was granted.]

Mo. 920. pl. 1280. Pasch. 41 Eliz. B. R. Awerbie's case. S. P. — Cro. E. 660. pl. 7. J. 42.

Johnson v. Awtrey. S. C. & S. P. accordingly. — S. C. cited Cro. J. 42. A prescription

A prescription that parishioners shall cut their grafs and make it into cocks, and set out the tenth cock for the parson, adjudged a good prescription and bar against the parson, who sues for tithes of the after-moth. Cro. J. 116. pl. 4. Pasch. 4 Jac. B. R. Green v. Austen. — Yelv. 86. S. C. held accordingly.

Tithes are not payable of *after-moth* de jure, and therefore it is but form to lay a custom to be discharged thereof in consideration of making the former mowing into hay; for tithes are payable only of things semel in anno renovantibus; per Treby Ch. J. Ld. Raym. Rep. 242, 243. Trin. 9 W. 3. in case of Norton v. Briggs.

*Cro. J. 42. [12. If a man pays tithes of *hay* no tithes de jure ought to be paid for the *pasture* of the same land for the same year, for he shall not pay tithes twice in the same year for the same thing. Pasch. 16 Mo. 758. Jac. B. between Nichols and Hooper, per Curiam.

pl. 1048. 3 Jac. B. R. and there said per Towle, that it was so adjudged between Spencer and Johnson, and otherways adjudged between * Hall and Fertiplace, because the *after-pasture* is but the *relicks of the hay, of which he had paid tithes before*. Pasch. 17 Jac. S. C. but B. Kinnifston.]

S. P. does not appear. [13. 2 H. 4. Rotulo Parliamenti, numero 93, not for *agistments in such after-grafs.*]

— 2 Inf. 652. S. P. [14. If a man pays tithe of corn, he shall not after pay any tithes for (*) the *strubble* that grows the same year upon the same land. Hill. 6 Jac. B. Placito 13. Smith's case, per Curiam et Pasch. 7 Jac. per Curiam, same case.]

See pl. 16. S. C. by Tanfield to have been adjudged in one EDOLPH'S CASE. — 2 Inf. 621. S. P. — Ibid. 652. S. P.

See 2 Brownl. 30. [15. M. 9 Jac. between Backster and Hope, for the *after-pasture.*]

S. C. — a Bulst. 239 cites Hill. 8 Jac. C. B. Rot. 1109. Co. Entries, 459. S. C. that for the payment of tithe corn and hay, to be discharged of paying any thing for all his young cattle kept and bred up for agriculture, a prohibition was granted; because husbandry cannot be without cattle, and therefore ought not to have tithe of them.

See pl. 13. S. C. [16. 2 H. 4. Rotulo Parliamenti, numero 93. not for the *agistments in such after-grafs.*]

2 Inf. 621. and 652. S. P. Poph. 142. S. C. & S. P. But if he had taken all the benefit of his pasture by putting in guest horses, without having mowed it before, then tithe is payable for them, and a prohibition was denied.

*[575]

[17. If an inn-keeper *pays tithe-hay* of certain land, and the rest of the year *after puts into the same lands the horses of his guests which come to market* there in the same town, no tithes shall be paid for the herbage of these horses, for this is but the after pasture of the land, of which he had before paid tithes. Tr. 16 Ja. * B. R. between Richardson and Cable, per Curiam, and a prohibition granted.]

[18. 2 H. 4. Rotulo Parliamenti, numero 93. not for the *agistment in such after-pasture.*]

[19. No tithes are due by the law of a *fulling-mill*, for no tithes in kind can be taken thereof, for only moneys are paid for the labour, and so it is but a personal tithe. Hill. 16 Ja. B. R. between Johnson and , resolved, and a prohibition granted.

This

This was a Berkshire case; but Mich. 11 Car. B. R. between R. that Johnson and Dauridge, per Curiam resolved, that tithes by the law upon this are due thereof; and a prohibition denied accordingly.] surmise only, that

by the law of the land tithes are not payable, a prohibition was granted; for Doderidge said, that of such things whereof the gain comes only by labour of men, tithes are not payable, but of things renovant, &c.—2 Roll. Rep. 84. Pasch. 17 Jac. B. R. Anon. S. P. and seems to be S. C. and Calthrop said; that Warburton and Nichols were of opinion 12 Jac. that tithes shall be paid of a fulling-mill, viz. the 10th penny of the gain, but of a tithe mill the tenth dish of the corn; for this is in nature of a predial tithe, and that so it was held 5 Jac. in case of U1 v. Lux. At another day Doderidge held, that unless an especial custom be alledged for payment of tithes of a fulling-mill, no tithes shall be paid; for that he had spoke with the civilians, who held, that tithes shall be paid of such mill, but they cannot agree what manner of tithes that is; for (some say it is a personal tithe), and others say it is a predial tithe; but he said, that this cannot be a predial tithe, because it accrues only by the labour of man, so that if he shall have this tithe as predial tithe, then another tithe will be demanded of him, that sheers the cloth, and of the dyer also, and so tithes shall be paid several times for one and the same cloth; besides the usage of the whole country is to be respected; for, for *tynn-mills*, or *lead-mills*, or *plate-mills*, or *rag-mills* no tithes shall be paid, and therefore, &c. And to this Haughton and Crooke J. agreed and therefore as to the grist-mill consultation was granted, but as to the *fulling-mill* the prohibition stood.—No ancient mill is tithable, but mills newly erected shall pay tithes by the statute of 9 E. 3. cap. 5. Mar. 15. pl. 36. Pasch. 15 Car. Anon. —So of a *copper-mill*, *fulling-mill*, *shaving-mill*, they shall pay no tithes. Litt. Rep. 314. Mich. 5 Car. C. B. Anon. —Ld. Coke says, that the case of the tithe of mills was never (that he knew of) judicially determined. 2 Inst. 622.

For tithes of mills, see (E. a)

[20. If a man pays tithes in kind to the parson for his lambs, calves, and other things, going and arising upon his pastures, wafts, lands, meadows, &c. After in the same year he shall not pay tithes of the agistments in the same pastures, wafts, &c. 2 H. 4. Rotulo Parliamenti, numero 93. This is an exprefs petition of the Commons.]

21. In trespass it was said by the justices, that of *hounds*, *apes*, *thrushes*, *popinjays* and the like, which are tame, and are only things of pleasure, no tithes shall be paid; for replevin nor appeal of felony does not lie of them; for a man has not properly a property in them, and yet trespass lies of taking them. Br. Dismes, pl. 20. cites 12 H. 8. 4.

22. Tithes shall not be paid but of things that increase annually. Br. Dismes, pl. 16. cites the Register.

23. Tithes shall be paid of *birch*; for it is only for fuel. Cro. Mo. 907. E. 1. pl. 1. Hill. 24 Eliz. B. R. Foster v. Leonard. pl. 1270.

Peacock. S. C. accordingly, though it be above the age of 20 years.—Cro. J. 199. pl. 29. Mich. 5 Jac. B. R. Anon. S. P. held accordingly, and cited Leonard's case, as to adjudged.—See pl. 5. Leonard's case cited as to tithes of beeches.

24. Tithes of the *loppings of oak, ash and beech growing out of the roots* of trees before cut down, shall not be paid unless the loppings were cut within 20 years before the last cutting. Le. 79. pl. 105. Pasch. 26 Eliz. B. R. Daws v. Mollins.

25. Where *hornbeams*, *fallows*, *maples*, *bazles*, &c. grew spar- [576]
sim amongst oaks in a wood, and the owner felled the whole wood, If timber
and caused them to be promiscuously cut into faggots, and bound up in trees usually
faggots together, and the most part of every faggot was oak, and the lopped
residue was of little value, so as the severance of the fallows, &c. grow spar-
from the oak would not quit the charge; in such case tithes shall sim in a
wood, and

are lopped when the wood is cut, this shall only privilege itself, and the other trees shall pay tithes; but then the libel ought to be special. Sid. 300. Mich. 18 Car. B. R. Cornel v. Hawes.

not be paid. 2 Le. 80. pl. 105. Pasch. 26 Eliz. B. R. Dawes v. Mollins.

26. *But of the other part, if the most part of the wood be fallows, &c. and here and there sparshim grows an oak, &c. and the owner cuts down all the wood, and makes faggots as before, tithes in such case shall be paid for them. Ibid.*

shall pay tithes; but then the libel ought to be special. Sid. 300. Mich. 18 Car. B. R. Cornel v. Hawes.

2 Roll. Rep. 83. Pasch. 17 Jac. B. R. because aspe-trees serve for arrows, which are for the defence of the realm.—Gouldsb. 161. pl. 93. Hill. 43 Eliz. The paison of Ramfey's case, S. P.

27. *Asp* is comprehended within gross-wood, because it may serve for building or reparation. 2 Init. 643. cites it as resolved by the whole court. Plowd. Com. 470. Trin. 26 Eliz. in Molyns's case.

Cro. E. 55. pl. 2. Anon. seems to be S. C. So if

28. *Little oaks* under twenty years growth apt for timber in time to come shall not render tithes. Mo. 908. pl. 1271. Pasch. 29 Eliz. Wray v. Clench.

trees apt for timber are cut down under twenty-one years and *new germens* grow, no tithes are due, though they are cut under that age.—Of germens of oak growing of a root, the tree *whereof was not twenty years old when cut* there shall be tithes paid; for oak or other timber cut under that age shall pay tithes as other underwood; but if the oak or other timber tree was *twenty years old when cut* it was not tithable and for that the germens of the roots of such trees cut at that age shall pay no tithe; per Cur. 12 Mod. 524. Trin. 13 W. 3. Fox v. Thexton, cites 2 Inf. 493.

29. Not of things *feræ naturæ* unless by custom. Mo. 599. pl. 822. Mich. 37 & 38 Eliz. Hugton v. Prince.

30. If *timber trees* be often topped and lopped for fuel; yet the tops and lops are not tithable; for the body of the trees being by law discharged of tithes, so shall be the branches; and therefore he that cuts them, may convert them to his own use, if he please; said by Coke Ch. J. to have been of late twice adjudged. Godb. 175. pl. 242. Pasch. 8 Jac. C. B. Dr. Newman's case.

31. If a man suffer *apples* to hang so long by negligence that they are *stolen*, he shall pay tithes. Per Yelverton and Crook J. Het. 100. Trin. 4 Car. C. B. Anon.

32. Tithes of *cabbages* or *gillyflowers*, or other *herbs* shall be paid, if it be of a new garden; per Richardson and Harvey; and per Richardson so it shall be of an old garden, if there be not any custom to discharge it. Litt. Rep. 148. Pasch. 4 Car. 1. C. B. in Stiles's case.

33. No tithes are due of the *tenth swarm of bees*, because they are *feræ naturæ*, but only of the tenth of the wax and honey. Cro. C. 404. pl. 2. Pasch. 11 Car. Anon.

34. A *glass-house* shall pay no tithe. Litt. Rep. 314. Mich. 5 Car. C. B. Anon.

35. Of *fürze sold* tithes shall be paid. Litt. R. 368. Pasch. 7 Car. C. B. Rooket v. Gomerfall.

Sid. 300. pl. 5. Cornel v. Hawes

36. If *wood* be usually cut for *firewood*, though it be permitted to grow to *twenty-five years* growth or more, it shall pay tithe; per tot. Cur. Lev. 189. Trin. 18 Car. B. R. Hawes v. Cornwall.

S. C. mentions it to be let grow till forty years old and held that one shall not avoid the payment of

of tithes by this means, so long as the thing cut is intended to be employed as wood for firing, &c.
 — See 2 L. 80. pl. 105. Pasch. 26 Eliz. B. R. Daw v. Mollin e contra.

* 37. *Pollards of fifty years growth* shall pay tithes when felled. Per Windham. Lev. 189. Trin. 18 Car. 2. in case of Hawes v. Cornhill.

38. Plaintiff libelled for tithes of sheep. The defendant to have a prohibition, suggests, that he took them in to feed after the corn was reaped *pro melioratione agriculturae infra terras arabiles & non aliter*; it was held that the parson ought not to have tithes of the corn and sheep too, which makes the ground more profitable and to yield more. Mod. 216. Trin. 28 Car. 2. C. B. Anon.

39. Plaintiff libelled for tithes of faggots, the defendant suggested that no tithe was payable for oak-faggots, the plaintiff for a consulation may shew that the defendant had so sorted the faggots that it was impossible to take the tithe of one without the other. Arg. 8 Mod. 47. Trin. 7 Geo.

(R) Vide Postea, Title A. To what Thing the Modus shall extend.

[1.] If there have been two ancient corn-mills de tempore, &c. for which 6s. 8d. hath been paid for the tithes de tempore, &c. and after by continuance of time the mill-stream changes its course, and runs into a place a little distance from the ancient stream, and thereupon the owner of the mill pulls down one of the ancient mills, and rebuilds it in the new place where the stream runs, this shall be discharged of any tithes by force of the ancient modus, for this comes by the act of God, and not by the act of the party. Mich. 11 Car. B. R. between Johnson and Dunridge, per Curiam resolved, and a prohibition granted accordingly. But the court said, if the stream be altered by the act of the owner himself, tithes ought to be paid thereof as for a new mill.]

pl. 1. 2. S. C. And these two first pleas seem (as Mr. Danvers observes) to be misentered here. They should have come in at (F. a) and the other pleas beginning pl. 3. 4. &c. here under the letter (R) should have been continued under the letter (Q) preceding.

This is printed as in (R) the original. But the pleas under this letter seemed placed here confusedly and should have been distributed under other letters. See (Z) (E. a)

(Q) pl. 19. S. C. but D. P.— See (F. a)

[2. Not of such things which are not yearly renewing.]

[3. If a man pays tithe for the fruit of trees, and after cuts down the same trees, and makes them into billets or faggots, and sells them, he shall not pay tithes for the billets or faggots, because this is not a new increase. Co. Magna Charta 652. 621.]

[4. If a man keeps an horse within the parish only for his saddle to ride, no tithes shall be paid for this horse, because this is a barren animal, not renewing, but only for his labour. Tr. 15 J. B. R. between Lamkin parson of Thimblethorp and Wild, where the case was, that a man leased land to another, reserving the going of a nag to ride, and after the lessor was sued in the Spiritual Court for the tithes of the nag, and a prohibition granted by Mountague,

Cro. J. 430^e pl. 8. Hampton v. Wild. S. C. accordingly, and a prohibition granted.— Poph. 116. Laurking v. Croke,

Dismes, [or Tithes.]

J. S. C.
accord-
gly.
Fol. 642.

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Croke, and Doderidge, because this is a sterilit animal, and used only for to ride; and, as it was urged at the bar, the lessee paid him tithes for all the herbage, but the court took no advantage of this; but * Houghton seemed e contra, for it seemed to him that no barren cattle should be discharged of tithes unless such as were used for husbandry; but this was not used about husbandry, ergo.]

[5. If the soil of an orchard be sowed with any kind of grain, the parson shall have tithes of the fruit-trees and of the grain, because they are of several and distinct kinds. Co. Magna Charta 652.]

[6. No tithes shall be paid of chickens, because he pays tithes of eggs. Hill. 15 Ja. B. R. resolved, and a prohibition granted accordingly.]

[7. If a man pays tithe-lamb at Mark-tide, and at Midsummer he shears the residue of the lambs, scilicet, the nine parts, [the other nine] he ought to pay tithe-wool of them, though there is but two months between the time of the payment of the tithes of lambs which were not shorn paid with their fleeces, and the sheering of the residue, for this is a new increase. P. 16 Ja. B. between Nicholls and Hooper, per Curiam, and a prohibition denied accordingly.]

2 Bull. 238.
Price v.
Maskall.
S. C. but
no resolution.

[8. A man shall not pay tithes of the herbage of sheep, because he pays tithe of the wool, for otherwise he shall pay tithes twice of one increase. Tr. 12 Ja. B. R. between Maskall and Price, dubitatur.]

No tithe shall be paid for the herbage of sheep, because they are *fructuosa animalia*. Roll. Rep. 62. S. C. held per Cur. — Poph. 197. Mich. 2 Car. is a nota, that per Whitlock de animalibus inutilibus the parson shall have the tenth-part of the bargain for the depasturing in the parish before the sale, as of horses, oxen, &c. but of the animalibus utilis he shall have the tithe in specie, as of cows, sheep, &c.

[9. If the parson hath tithe of corn one year, and the land is left unsown the next year, to the intent it may be plowed and made ready to be sowed the third year, no tithe shall be paid for this second year, for by the lying thereof fresh the land is bettered, and the parson will have better tithes the third year. P. 7. Ja. B. Smith's case, per Curiam.]

(S) For what Things Tithes shall be paid by Custom, where they ought not de Jure.

* Hob. 10.
pl. 12.
Edfield v.
Tisdale. S.
C. a pro-
hibition was
granted, and
the court

[1. BY custom tithes ought to be paid for the rent reserved upon the leases of houses, though not de jure, for this may commence upon a lawful consideration. Co. 11. Dr. Grant 16. (But quare thereof, for the reason of the book is repugnant in itself.) Vid. M. 12 Ja. B. Hobert's Reports 16 * Layfield's case, a prohibition was granted.]

directed that they declare upon the prohibition, and then proceed to judgment. — Ibid. cites Dr. Grant's case, where a consultation was granted as to a house in St. Martin's le Grand, which was not within the statute as to London; and the reason was, because it may be supposed that such form of tithing was used for the land itself before it was built upon, and then the building cannot

cannot take it away.——In the margin is a note, that *modus decimandi* can hardly stand to rise and fall according to the rent by prescription.

A. leased [took a lease] of a house in London, rendering rent, and afterwards purchased the same house in fee; though now, there is not any rent paid, yet the parson shall have tithes according to the rent last paid; per Walters, who said, that he could shew the case adjudged. Litt. Rep. 141. Mich. 4 Car. in Scacc. in case of Burgefs v. Symons.

[2. But *otherways* it is of *new houses*, of which no custom can be. M. 12 Ja. B. Dr. Leyfield's case, per Curiam.] But if one *erects a new house, and dwells in it, or leases it rent-free*, the parson shall not have tithes nor remedy; per Walters. Litt. Rep. 141.

[3. Whether a parson can prescribe to have tithes of *grofs-trees*, [579] against the common law, and the statute de silva cædua, quære 9 H. 6. 56.]

[4. By a custom, tithes may be paid of *fish taken in island* by merchants of a town in England and brought into a town *here to the parson of the town*. My Reports, 14 J. Goslin and Harding, adjudged.] Roll. Rep. 419. pl. 5. S. C. & S. P. admitted. —Tithe of fish is merely a customary tithe; per Richardson. Het. 13. Pasch. 3 Car. C. B. Anon. —Fish in a river may pay tithes by custom. Vent. 5 Hill. 20 & 21 Car. 2. B. R. Anon. —See (C) pl. 6. and the notes.

[5. By a custom, tithes shall be paid of *pigeons* that shall be spent in my house, though not of common right. Mich. 14 Ja. B. Watley and Hanberry, agreed per Curiam.] See C. pl. 2. and (Z) pl. 4. S. C. —But de jure without a custom no tithes shall be paid for them, if spent in the house. Litt. Rep. 311. Mich. 5 Car. C. B. Flower v. Vaughan. —Hetl. 147. S. C. and S. P. —Ibid. 40. Trin. 3 Car. Anon. S. P.

[6. So by a custom tithes shall be paid of *wood consumed in an house*. Mich. 14 Ja. B. Watley and Hanberry, agreed.]

[7. So by custom tithes shall be paid of a *lime-kiln*, though none are to be paid de jure without a custom. M. 13 Ja. between Thomas and Perry, per Curiam.] S. P. cited by Hutton, as determined in Berry's case. Hetl. 14.

[8. By a custom tithes shall be paid of *white salt*. Tr. 16 Ja. B. R. between Jones and Gower, admitted; but a prohibition granted upon a modus.]

9. Libel alledged a custom to have 2s. in the pound for *every house and shop in the town*. The defendant as to the custom answered, that he did not believe there was any such, and suggested for a prohibition, that he was a butcher, and set up a stall in the market-place to sell flesh in the market only, and that he had no other shop nor house there. This was held to be no denial of the custom, but that if it had been expressly denied, they cannot proceed in the spiritual court. Lat. 210. Trin. 3 Car. Clerk v. Prowle.

10. In Derbyshire the 10th *dish of lead* is now paid for tithe by custom; per Richardson. Litt. Rep. 147. Pasch. 4 Car. C. B. in Stiles's case.

11. *Turf, gravel and chalk*, are part of the freehold, and not titheable; per Keeling. Mod. 35. pl. 84. Hill. 21 & 22 Car. 2. B. R. 2 Keb. 596. pl. 20. Amiers v. Chambers. S. P. and seems to be S. C.

Tithes, [or Tithes.]

12. *Tithe-oar* is not due of common right but by particular custom only; and the court therefore directed a trial to be had at law, whether there was any, and what custom within the said township the payment of tithe-oar, with direction to the judge to enquire the posture, how the custom was found upon the trial. 2 Vern. 46. pl. 43. Pasch. 1688. Buxton v. Hutchinson.

(T) Of what Things.

[Rent.]

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Fol. 643.

And a modus to pay 2 s. in the pound out of the rent reserved from time to time is no modus. Ld. Raym. Rep. 696, 697. Mich. 13 W. 3. Byne v. Doderidge.

[1.] *If a man leases pasture-land, rendering a rent, the lessee shall not be charged for the tithes of the rent, but he ought to have tithes in kind of land; and if they be but barren cattle, yet he ought to sue for tithes in kind of them if any be due, and so it was resolved, P. 14 Ja. in B. between parson Ellis of Devon and Drake; though it was said, that by the spiritual law he had the election, for this crosses the common law.]*

(U) What shall be said *Minutæ Decimæ* [and who shall have them.]

*Cro. E. 467. (bis) pl. 24. Beddingfield v.

[1. **TITHES** of *saffron* are *minutæ decimæ*. P. 38 El. B. R. between Beddingfield and Freake. They are great tithes. M. 10 Ja. B. R. per Curiam.]

Peak. Pasch. 38 Eliz. B. R. the S. C. a consultation was awarded. — Mo. 909. pl. 1277. S. C. and consultation granted. — Ow. 74. The Dean and Chapter of Norwich's case. S. C. — Gouldsb. 149. pl. 75. S. C. — And by all those books the vicar shall have the tithes of saffron of land newly sown therewith, though the parson had the tithes of the same land before when it was sown with corn. — S. C. cited Arg. by the name of the Dean and Chapter of Norwich's case as adjudged. Cro. C. 28. Hill. 1 Car. C. B. — But Henden answered, that was not because they were *minutæ decimæ*, but because, upon the endowment found, the allegation was, that the parson should have the tithe of corn and hay only. But Yelverton said, that that was not the reason, but because they were accounted as *minutæ decimæ*, and appertained to the vicar. — S. C. cited Hutt. 78. — S. P. Arg. Palm. 220. and ibid. 222. cites S. C.

[2. If a vicar be endowed de *minutis decimis*, and he hath used by force of this endowment for a long time to have *wood* [woad] which is but of the *annual value* of 6 s. 8 d. by reason of the small value of the wood and usage, the wood shall pass by the words *minutæ decimæ*. Mich. 10 Jac. B. R. between Reynolds and Green, per Curiam, adjudged upon evidence at the bar, though wood in its nature be not *minutæ decimæ*.]

[3. Tithes of *flax* are *minutæ decimæ*. M. 14 Car. B. R. in Noah Webb's case, per Curiam.]

4. *Weld*, which is used for dying, was sown with the corn, and after the corn is reaped, the next year, without any other manur-
ance, the said land brings forth and produces weld. There was a
special verdict, whether the vicar shall have the tithe of it, or the
parson, but one of the parties died before any judgment. Hutt.
78. Hill. 1 Jac. cites it a Kentish case.

Tithes of
welde
(which is a
kind of
grass grow-
ing amongst
other grain,
and com-

monly sown therewith) are not minutæ decimæ; Arg. Cro. C. 28. pl. 2. cites it as resolved 3 Jac.
Hertman v. Boxley.

5. And if *tobacco* be planted here, yet the tithes thereof are mi-
nutæ decimæ. Arg. Hutt. 78. Hill. 1 Car.

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6. As to all new things, viz. *hops*, *woad*, &c. if it doth not ap-
pear by material circumstances to the contrary, shall be taken as
minutæ decimæ. Hutt. 78. Hill. 1 Jac. cites it as a Kentish
case.

7. B. was farmer to the Dean and Chapter of Norwich, who had
the parsonage impropriate, and had used to have tithes of grain and
hay, and the vicar had the small tithes; and a field was planted with
saffron which contained 40 acres; and it was adjudged that the
tithes thereof belong to the vicar. Hutt. 78. cites Pasch. 3 Jac.
B. R. Beddingfield's case.

If it does
not appear
by material
circumstances
to the con-
trary, it
shall be
taken as

minutæ decimæ. Ibid. — S. P. cited Arg. Cro. C. 28. in pl. 2. as adjudged accordingly.
Pasch. 43 Eliz. in the Dean and Chapter of Norwich's case. And Yelverton said the reason was
because they were accounted as minutæ decimæ, and appertained to the vicar.

8. The question was for *hops* in *Kent*, and adjudged that they
were great tithes; but as for hops in orchards or gardens, these
were resolved to belong to the vicar as minutæ decimæ. Hutt.
78. Hendon serjeant cited it as 3 Jac. Potman's case.

9. *Lamb and wool* are included within small tithes. Poph. 144.
Trin. 16 Jac. says it was agreed in case of Nicholas v. Ward.

10. In trespass brought for taking away two load of woad, it was
resolved by all the justices, that the tithe of *woad growing in the*
nature of an herb, is minutæ decimæ, and adjudged accordingly.
Cro. C. 28. pl. 2. Hill. 1 Car. C. B. Udall v. Tindall.

Hutt. 77.
Uvedale v.
Tindall.
S. C. and
S. P. agreed
accordingly
per Cur.

11. If the *endowment of the vicarage* be lost, small tithes must be
paid according to prescription; per Twisden. Mod. 50. pl. 105.
Hill. 21 and 22 Car. 2. Tildell v. Walker.

12. *Clover-grass* is a small tithe. 3 Keb. 479. pl. 13. Trin.
27 Car. 2. B. R. Darrel v. Withers.

13. Some of the justices held that the nature of small tithes are
not altered by their quantity, and though they grow in *common fields*,
and though Cro. C. 28. Udall v. Tindall and Hutt. 78. it is admit-
ted that the nature shall be altered by the quantity; yet Ow. 74.
Dean and Chapter of Norwich's case, and Mo. 909. Beddingfield
v. Feak. and Cro. E. 467. S. C. this is not admitted. 3 Lev.
365. Trin. 4 W. & M. in C. B. Wharton v. Lisle.

Holt Ch. J.
thought the
place mate-
rial where
they grow.
But 3 J.
contra and
said they
should only
consider the
nature of the
thing, if corn be
sown in a garden,
parson shall have it;
if sown in a field
the vicar; but
if the greatest part
of the parish be
sown with small
tithes, the parson;
for otherwise the
greatest part
will

nature of the thing, if corn be sown in a garden, parson shall have it; if sown in a field the vicar; but
if the greatest part of the parish be sown with small tithes, the parson; for otherwise the greatest part
will

will be transferred to the vicar, as Dolbin and Gregory said; but Eyres said, in that case he should not have them unless by *usage*. 12 Mod. 41. Trin. 5 W. & M. Wharton v. Lisle.

* If a man converts *arable into pasture*, though the parson had the tithe of grain, yet the vicar shall have the tithe of milk and cheese, and though in some places the parson has the tithe of *hops*, &c. which is a small tithe, it was said, per Eyre J., that this was established by *usage* Skin. 356. S. C.

As to this objection that it shall be a small tithe when sown in

small parcels; and that if a great quantity of land be sown with a thing which is a small tithe, that then this shall become a great tithe by reason of its quantity; the court answered, that *this is not the case*, for here but *twenty-six acres* are found to be sown when the parish consists of 1200 and these twenty-six acres may be sown by forty several persons, one man may sow half an acre and another a lesser part, as may be seen a little part at end of a land in the common fields frequently, but when the greater part of a parish is sown with flax, then they would consider, if it shall be great or small tithes here, or not. Skin. 357. Trin. 5 W. & M. in B. R. Wharton and Lisle.

14. Tithes are *minutæ with respect only to the quantity and not to quality* of the thing; per Holt Ch. J. Carth. 264. but the judgment given by the other 3 J. was contrary. Vide Ibid. Wharton v. Lisle.

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(X) Incidents.

What *Incidents* belong de Jure to Tithes. As to the *Setting out* of Tithes.

By the civil law the parishioner ought to give the parson notice when the tithes are set forth, per Hutton. But adjudged that the common law does not oblige him to give notice. Noy. 19. Trin.

[1.] If a parishioner sets out his tithes, and *severs the tenth part* from the nine parts *justly and truly*, though he *does not give a personal notice to the parson*, or general notice in the church, *of the time of setting out the tithes*, so that the parson may be present at the setting out the tithes, and see it to be justly done, yet this is a good setting out of the tithes. Mich. 13 Car. B. R. between Chase and Ware, per Curiam in an error upon a judgment in an action upon the *case against the parson, for leaving his tithes of hay upon the land of the parishioner after notice of the setting out*, by which the parishioner lost his grafs there; but it was not alledged, that the parson had notice of the time of setting out of tithes, and yet the court affirmed the judgment against the parson. Intratur Trin. 13 Car. Rot. 564.]

15. Jac. Spencer's case.—2 Vent. 48. Trin. 1 W. & M. in C. B. Anon. S. P. and after two motions the court were all of opinion that no notice need be given, and cites it so adjudged in Noy. 19. though the ecclesiastical law is otherwise, and cites also the principal case here of Chase and Ware and Sty. 342. [Linlinton v. Maurice] where it is held, that if an action be brought against the parson for not taking away his tithe after it is set out, notice must be given before such action. —Resolved in C. B. that it is not necessary for the parishioner to give notice to the parson of his setting forth of tithes. Vide Roll 643. 2 Roll 302. Deggs Parsons Counsellor 220. Hob. 107. that a custom for tithing without view is ill. Quære the difference. Comb. 128. Trin 1 W. & M. Periam v. A. vicar in C. B.

Libel by a parson in the Spiritual Court on the statute of 2 E. 6. for the not setting forth of tithes, consisting of various articles. Defendant not appearing was excommunicated for it; and now prayed a prohibition; because one of the articles was for not giving notice of the setting out of tithes. Per Cur. let it go; because a parishioner is not bound either by common-law or statute to give the parson notice of the setting forth, and so went quoad extrapenendo decimas. 12 Mod. 117. 111. Hill. 8 W. 3. Gale v. Ewer. —Comyns's Rep. 22. 24. S. C. and a prohibition was granted. —Ruled by Lee Ch. J. on evidence at a trial that though by the ecclesiastical

tical law notice is necessary to be given, yet by our law it is not; and accordingly the defendant consented that the jury should find a verdict for the plaintiff. 2 Bernard Rep. in B. R. 174. Trin. 5 Geo. 2. Hewke v. Wright.

[2. When the tithe of grafs is severed from the nine parts, the parson *de jure* may make it into hay upon the land where it grows, as well as the parishioner himself. Hill. 14 Ja. B. R. Newberry and Reynolds parson of Collomton in Devon per Curiam, and a prohibition denied accordingly, where the parson had alledged a custom so to do and the court held it idle.]

Roll. Rep. 420. pl. 6. Reynolds v. Newberry, S. C. accordingly, and though a custom

was alleged that in that county the parson should not make his grafs into hay upon the land but should carry it out, the court paid no regard to it, but Warburton said, that it was an unreasonable custom.

[3. So in this case, the parson may go over the land of the parishioner in the way to come at the place to make it into hay, for this is incident to the tithe. M. 14 Ja. B. My Reports, Newberry and Reynolds.]

Roll. Rep. 420. pl. 6. S. C. and S. P. accordingly.

4. The parson shall have reasonable time to take the tithes severed from the nine parts and to dry them, before that he shall carry them away. Br. Dimes, pl. 12, cites 12 E. 4. 6,

Br. Traverse per, Sec. pl. 242. S. P. and

cites S. C.

5. 27 H. 8. cap. 20. Tithes shall be paid according to the custom of the place.

6. 2 & 3 E. 6. cap. 13. s. 1. Every of the king's subjects, shall justly, without fraud, set out and pay all manner of their predial tithes in kind as they happen, as hath been of right within forty years before this act, or of right or custom ought to have been paid. And no person shall carry away any such or like tithes which have been paid within the said forty years, or of right ought to have been paid, in the places tithable, before he hath justly set forth for the tithe the tenth part of the same, or otherwise agree for the tithes with the parson, vicars, or other, or farmer of the tithes, under the pain of treble value of the tithes.

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7. S. 2. Whensoever the said predial tithes shall be due, it shall be lawful to every party to whom the tithes ought to be paid, or his servant, to see their tithes truly set forth, and the same quietly to carry away.

8. If the parishioner sets forth his tithes and takes them again; he may be sued for tithes in the Spiritual Court, and the setting forth shall not excuse him. Per Cur. 2 Le. 101. pl. 124. Trin. 30 Eliz. B. R. in case of Bennet v. Shortwright.

13 Rep. 23. Trin. 44. Eliz. B. R. Spratt v. Heal. S. P.

—This

is not setting forth within the statute. 2 Brownl. 9. Ward v. Pomeroy.—S. P. but if taken away by a stranger is it an excuse. Per Pemberton Ch. J. 2 Show. 184. pl. 187. Hill. 33 and 34 Car. 2. B. R. Anon.—4 Le. 7. pl. 30. 26 Eliz. B. R. Gerrard's case. S. P.—Mo. 912. pl. 1287. B. R. Leigh v. Wood, S. P.

9. If the parishioner sets forth his tithes and the parson will not take them away, there is no reason he should be charged again. Cro. E. 206, Mich. 32 & 33 Eliz. C. B. Bennet v. Shortwright.

2 Le. 101. S. C. and S. P. and if the tithe is destroyed by the cattle by the

laches of the parson, he shall not have tithes again.

10. Libel,

10. Libel, &c. for not setting out tithes; the defendant suggested that he set out the tithes but that a *party unknown had taken them away*. The court agreed, that if the tithes are divided from the nine parts and a stranger takes them away, the parson hath his *remedy at common law against such person*, and shall not sue the parishioner in the Spiritual Court for the same. Pasch. 43 Eliz. Noy 44. Webb v. Pett.

11. Libel for tithes upon the statute, &c. the case was, that the parishioner had *set forth* his tithes *according to the statute but would not suffer the parson to carry them away*, and the parson libelled, &c. and the defendant suggested for a prohibition, *that he did hinder him from taking and carrying them away one way (which was the usual way) but he might have come for them another way*; but the whole court were clear of opinion, that this was a fraudulent and not a good setting them forth, for he is to set them forth, and also to suffer the parson to carry them away, and the surmise as to the carrying them another way is no ways material. Bullst. 108. Hill. 8 Jac. Anon.

Jo. 89. pl.

3. S. C.

& S. P.

agreed.—

Cro. C. 63.

pl. 7. Hill.

2 Car. in

Cam. Scacc.

12. If one who has some colour of title sows the land and sets out the tithes, though this be by a disseisor, it is good for the parson; otherwise it is *where one without any colour sets out tithes*, this is no setting out in law; per Jones J. 3 Bullst. 337. Hill. 1 Car. B. R. in case of Mountford v. Sidley.

Sydley v. Munford. S. C. and judgment affirmed.

Ibid. 336.

S. C. per

Erew Ch. J.

the remedy

is by action

on the case.

—S. P. and

agreed, that

an action on the case lies, and cites Pasch. 20. Jac. B. R. that such an action was brought by

Wiseman against the rector of Landen in Essex, for not accepting, &c. of the tithes of cheese.

Noy. 31. Dr. Bridgman's case.

13. Where tithes are set forth the parson hath a liberty for a *convenient time to come and carry them away*, which conveniency of time is triable by a jury; if he exceed a convenient time, then an action of trespass lies against him, because in such case he shall be taken to be a trespassor ab initio. Per Jones J. 3 Bullst. 336. Hill. 1 Car. B. R. Mountford v. Sidley.

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14. If a *mere stranger sets out tithe* this does not settle any property in the parson, so as to intitle the parson to bring action for the taking of them, Lat. 8. 1 Car. 1. B. R. Stilman v. Chanor.

15. If a *parishioner will not set out his tithe in cocks, when by custom he ought to do it*, the parson may sue in the court christian, *pro modo decimandi*; but then *the suit ought to be special* for not setting it out in cocks, and not generally for not letting it out; per Cur. Lat. 125. Pasch. 2 Car. in Layton's case.

Ibid. The

Reporter

says, that

there seems

a difference

where they

have been

to set out three or four days only, and whereby the space of a week, and then fetched away by the

owner of the land, &c.

16. If a *parishioner sets forth his tithes, and lets them stand two or three days* on his land, and afterwards takes and carries them away; this is not a setting forth within the meaning of the statute. Clayt. 20. pl. 34. August 1633. Per Davenport Ch. B. Judge of assize, and said that it had been so resolved. Anderson's case.

17. Libel

17. *Libel was for tithes of corn in stacks* [or shocks;] the defendant pleaded that he was ready to pay tithes according to common law, and that there is no such custom, and upon a refusal to allow this plea, it was moved for a prohibition, which was granted, because tithe corn shall be *paid in the sheaf, and if in stacks, it is by custom.* Sid. 283. pl. 15. Pasch. 18 Car. 2. B. R. *Ledgar v. Langley.*

18. Parishioner severed the tithes duly from the other nine parts, and gave notice to the *parson* and required him to take them off the land, but he *suffered them to lie there a long time.* It was held that case lies against the parson for not carrying them away, but not trespass vi & armis. *Ld. Raym. Rep. 187. Pasch. 9 W. 3. Shapcott v. Mugford.*

19. But in such case the *parishioner cannot turn in his cattle and eat the corn,* though the parson does not carry it away in convenient time; and it is unreasonable that the parishioner himself should be judge what is time convenient; adjudged. *Ld. Raym. Rep. 189. Pasch. 9 W. 3. Shapcott v. Mugford.*

Comyns's Rep. 12. pl. 14. Hill. 8 W. 3. B. R. Gale v. Ewer. S. P. and

Holt Ch. J. thought that the *turning in the cattle to the tithe made it a fraudulent severance,* and that a suit might be maintained for it in the Spiritual Court.

20. One is not bound to pay tithe *lamb* if he has any number under ten, because they are *entire things*; but if he has nine pounds of *wool* he shall pay tithe for it, viz. by an inferior weight, as by ounces, for that is *divisible.* Per *Holt Ch. J. 12 Mod. 498. Pasch. 13 W. 3. Selby v. Bank.*

(Y) Tithes in Kind.

How they ought to be paid.

[1. **A** Man is not bound to *make into hay* the *tithe of grass*, which he cuts, but he may set out the tithe thereof when it is in *grass-cocks*, for then he may well enough sever the tithe from the nine parts. P. 17 Ja. B. between * *Hide and Ellis*, per *Curiam.* *Hobert's Reports*, case 328. the same case. *Contra*, *Hill. 14 Ja. B. R.* between *Barham and Goose*, per *Curiam.* P. 15 Jac. B. R. in the same case per *curiam*, and a prohibition † denied. Tr. 15 Ja. B. R. between *Poppinger and Johnson*, per *Curiam*, and a prohibition denied. P. 13 Jac. B. R. per *Curiam*, and a prohibition denied. P. 2 Ja. B. R. cited *Hobert's Reports*, case 328, to be adjudged between *Hall and Simons.*]

Fol. 644.

* *Hob. 250. pl. 330. S. C. adjudged. For tithe naturally is only the tenth of the revenue of my ground, and not of my*

corn.—Heti.

133. S. C. in totidem verbis.—Roll. Rep. 173. in pl. 3. Pasch. 13 Jac. B. R. the court held, that the parishioner ought to make it into hay.—All that the parishioners are bound to do is to cut down the grass and divide it into ten parts, after which the parson is to make it into hay. 2 Wms's Rep. 523. by Ld. C. King. Pasch. 1729. Fox v. Ayde. And said it had been so resolved in one Reynold's case.

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[2. A

[2. A man is not bound to *tadder the tithe of grass* before he puts it into *grass-cocks*, and sets out the tenth part, for he may *put it into grass-cocks out of the swarth*, and then set out the tenth part. Contra Hill. 14 Ja. B. R. * Barham and Goose, per Curiam, and a prohibition denied accordingly; and so P. 15 Ja. B. R. per Cur. in the same case. Trin. 15 Ja. B. R. between † Poppinger and Johnson, per Curiam, and 2 prohibition denied accordingly.]

Twisden J. [3. A man may set out the tenth part of the *hops* for tithe *before they are dried*. Hill. 14 Ja. B. R. in Barham and Goose's case, put per Serjeant Hitchham and agreed per Mountacute.]
 Twisden J. said, that it had been a quere, and is not now known how the tithes of hops shall be set out, viz. whether by the tenth pole or by measure. Sid. 283. pl. 15. Pasch. 18 Car. 2 B. R.

Upon a bill for tithe of *hops* the case appeared to be this; plaintiff having given notice to the defendant that he would take his tithe in kind the first three days, & send out paid plaintiff every tenth bushell when picked, but afterwards he left every tenth pole severed from the ground, and said, the reason of paying them by the bushel at first was because gathered, but here and there a pole of those that were ripest; plaintiff objected that this was not an equal and fair way of tithing, because there was great difference in the value of the poles, and that this was not a legal separation, and two cases were cited where this manner of tithing had been adjudged to be ill. GEE v. PERCH, 10 W. 3. 17 Nov. GREG v. — Mich. 3 Ann. CHETTY v. REEVE, Trin. 1687. — Defendant insisted that he ought not to be at the charge of picking, and that plaintiff being entitled to tithe both of the hops and the bines, he ought to take them together.

The court unanimously agreed, that the method of tithing hops ought to be by the bushel or measure, not the pole. MS. Rep. Bliss v. Chandler.

Noy. 15. [4. The parishioner ought of common right to *cut down the corn, and prepare it for the parson*, and to set out the tithe from the nine parts. M. 3 Ja. B. R. between Perry and Chauncey, adjudged.]
 Parrey v. Chauncey. S. C. but S. P. does not appear.

[5. The parishioner of common right ought to make the *corn into sheafs*. P. 13 Ja. B. R. per Curiam.]

[6. The parishioner is *not* bound to gather and set up the corn *into hillocks or heaps*; but it is a good manner of tithing to *throw the sheaves out*. H. 6 Ja. B. R. Placito 13. per Curiam.]

Lat. 228. [7. Noy held clearly, that if *two parsons have portions of tithes by halves in a parish*, that the statute of E. 6. which commands the setting out tithes, does not injoin the parishioner in this case to divide the tithe by halves, and so to set out the parts single, but he ought only to set out the tenth, inasmuch as if the tithe was of a lamb, *the parishioner cannot divide it*. Lat. 24. Mich. 3 Car. Stilman v. Cremer.]
 Stileman v. Cremer. S. C. that there are two pensionary priests and the parishioners for

40 years used to set out the portions severally, but now they set them out generally. The question was if this was within the statute of E. 3. the tithe not being set out severally. Adjournatur. But the reporter says that by another report it was adjudged that the parishioner is not bound to divide it into moieties; but the parsons must divide it between themselves.

*[586] 8. The tenth part of the *milk of his cows* every meal must be paid *intire every tenth meal*; for otherwise the parson must be forced to keep a servant * for that purpose only, and perhaps the tithe would not amount to a pint a day; and decreed accordingly. And all agreed that the tithe-milk ought to be carried by the parishioners,
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Freem. Rep. 329. pl. 409. S. C. and three justices held, that

parishioners. Raym. 277. Pasch. 31 Car. 2. in Scacc. Dod v. Ingleton. there being no custom in the case,

they ought to respect the conveniency of the matter, and therefore it being the usage of the country to bring their tithe-milk and other small tithes to the church-porch, they thought the parishioners ought to bring their small tithes thither, it being an indifferent place for that purpose, but that for great tithes the parson ought to fetch the same. Raymond was of opinion, that tithes being due by the ecclesiastical law, and by that law small tithes are to be carried home to the vicar's house, and therefore he was of opinion, that this court ought to adjudge it so too.—12 Mod. 206. Mich. 10 W. 3. S. C. cited by Holt Ch. J. and said that it was a meer equitable decree, guided by the custom of the neighbouring parishes.—Lord Raym. Rep. 359. S. C. cited by Holt Ch. J. accordingly.

9. The parson cannot justify his coming to set out tithes without the consent of the owner; because by the statute of E. 6. the owner is to set out his tithes, and if he do not, he is liable to the penalty of the statute. Freem. Rep. 335. pl. 416. Mich. 1698. in Scacc. Anon.

10. Of common right tithe milk is payable at the parsonage or vicarage-house; per Cur. Lord Raym. Rep. 129. Mich. 8 W. 3. in case of Scoles v. Lowther.

11. By the law tithes of milk in kind ought to be carried by the proprietor either to the parsonage-house, or to the church-porch. Arg. and prohibition denied. Carth. 462. Mich. 10 W. 3. B. R. in case of Hill v. Vaux. A parishioner is not obliged so to do of common right, but only set

them out; and that therefore if this had been in the modus it would have made it a good case, and that the case of Dod and Engleton was a mere equitable decree, guided by the custom of neighbouring parishes; per Holt. 12 Mod. 206. S. C.

12. A suggestion for a prohibition was, that there was a modus time out of mind as to tithe of hops, that if the parson send a servant to pull part of them, he should have the tithe of them. It was objected, that the custom was void for uncertainty of how much ought to be pulled; and that by law the parson ought to have the tithe in the same manner without such pains; and the court were of this opinion, and a prohibition denied. Lord Raym. Rep. 504. Mich. 11 W. 3. Stedman v Lye.

13. Tithes of hay must be set out in grafs-cocks. 9 Mod. 117. Mich. 11 Geo. in Canc. Smithson v. Dodson.

(Z) For what Thing for a Collateral Respect.

[1.] If a man buys woods tithable, and burns them in his house, and shall not pay tithes for them, as well resolved. P. 14 Ja. in Banco, between parson Ellis and Drake.]

[2. No tithes shall be paid of wood cut and employed for inclosure in his husbandry. Tr. 38 El. B. R. between parson Ram and Patterson, admitted, Tr. 10 Car. B. R. between Brown and Nixon, per Curiam.] Mod. 683. pl. 941. Pasch. 44. Eliz. B. R. in the parson of Mil-

denhall's case. S. P. per Cur.—S. C. cited Saund. 142.—Mo. 917. pl. 1364. Pasch. 14 Jac. B. R. Lane's case. S. P.—Mar. 79. pl. 128. per tot. Cur. Pasch. 17 Car. C. B. in case of Wyedon v. Harden.—But otherwise if it be employed in the inclosing another's corn, though the

the same person has the tithes thereof; and a prescription to be discharged in such case was adjudged ill. 2 Satund. 141. Hill. 19 and 20 Car. 2. *Crouther v. Collins.*

* Where one cut down wood to make hedges, and used the greater part thereof in bedding, yet for the rest which was cut down for that purpose no tithes shall be paid; cited by Fennar. Cro. E. 499. in pl. 19. Mich. 38 and 39 Eliz. to have been adjudged in B. R.

No tithes shall be paid of wood under 20 years growth employed in hedge-poles for meliorating the coppices. Mo. 917. pl. 1304. Pasch. 14 Jac. B. R. Lane's case.

For wood employed to hedge or fence corn, where the parson had tithe-corn, no tithe shall be paid; and it was said to be a general rule, that no tithes shall be paid for any thing *per quod decime sunt uberiores.* Freem. Rep. 335. pl. 416. Mich. 1698. in *Seacc. Anon.*

Mo. 909.
pl. 1279.
S. C. and
S. P. re-

[3. For broom or other fuel expended in the house of the parson no tithes are due. P. 40 E. L. B. R. between Austin and Lucas, adjudged per Curiam.]

solved.—Cro. E. 609. pl. 15. S. C. and S. P. held by all the justices.—Mo. 683. pl. 941. Pasch. 44 Eliz. B. R. the S. P.—Custom in a parish to pay no tithes of *loppings* or wood for fire, &c. is a good custom; per tot. Cur. Mar. 79. pl. 128. Pasch. 17 Car. C. B. *Weeden v. Harden.*

Wood burnt in the house is exempt from the payment of tithes, but that is only so long as it is burnt in the house. Lord Raym. Rep. 129. Mich. 8 W. 3. in case of *Scoles v. Lowther.*

See (C) pl.
2. and the
notes there.

[4. No tithes shall be paid de jure for pigeons which are spent in my house, for this is for the preservation of those which labour in other things of which the parson hath tithes. M. 14 Ja. B. between Whatley and Hanberrye, resolved, and a prohibition granted.]

[5. But he shall pay tithes for such pigeons as he sells, as it was agreed in the case of Whatley.]

* Fol. 645.

[6. If a man keeps a family, and hath pigeon-holes about his house, and there keeps any pigeons and the young pigeons there encrease, and he kills and spends them in his house, he shall not pay any tithes for them (*) Hill. 13 Car. B. a prohibition granted, and for a consultation pleaded by the parson that he sold them between Vincent and Tutt.]

[7. If a man cuts down grass, and before he makes it into hay, being only put into swathes he carries it away and gives it to his plow-cattle for their necessary sustenance, not having sufficient for their sustenance otherways, no tithes shall be paid thereof. Mich. 9 Car. B. R. between Crawley and Wells, per Curiam, and a prohibition granted, this being an Hertfordshire case.]

[8. [So] If a man cuts down wood, and burns it to make brick for the reparation of his house within the parish, for the habitation of himself and his family, no tithes shall be paid thereof, inasmuch as the parson hath the benefit of the labour of his family. Tr. 10 Car. B. R. between Nixon and Browne, per Curiam.]

[9. So if a man cuts wood and burns it to make brick for the enlargement of his house within the parish for the necessary habitation of his family, no tithes shall be paid for it. Tr. 10 Car. B. R. between Nixon and Browne, per Curiam agreed.]

[10. But if a man cuts wood and burns it to make bricks for the enlargement of his house within the parish, more than is necessary for his family, as for his pleasure and delight, he shall pay tithes for it. Tr. 10 Car. B. R. between Nixon and Browne, per Curiam adjudged, and a consultation granted accordingly, where the plaintiff in a prohibition had affirmed that he burnt it for the reparation and the enlargement of his house generally, without

without saying that it was for the necessary habitation of his family, for they said, that by this surmise he might make a castle, and yet should pay no tithes.]

[11. For the ordinary *rakings not voluntarily scattered* no tithes shall be paid, because for those no tithes were due by the levitical law, and because they are but a scattering of the grain, of which he paid tithes before. Tr. 3 Ja. B. R. P. 14. Ja. B. R. between * Pit || and Harris a prohibition granted. P. 7 Ja. B. per Curiam. Hill. 8 Car. B. R. between Saunders and Paramour, per Curiam a prohibition granted. My reports 11 Ja. 14 Ja. between

Mich. 14 Ja. B. R. between † Joyfe and Parker, agreed Curia. Hill. 11 Ja. Peck and Harris, a prohibition being granted before this.]

* Roll. Rep. 379. pl. 35. S. C. a prohibition was granted.—† 3 Bullst. 243. Fosse v. Parker. S. C. & C. P. by Haughton J. obiter. — S. P. a.

greed. Cro. E. 475. pl. 3. Trin. 38 Eliz. B. R. in case of Sherington v. Fleetwood. — Mo. 910. pl. 1280. cites S. P. adjudged in Nichols's case. — S. C. & S. P. cited Cro. E. 660. pl. 7. as adjudged. — Litt. Rep. 31. Pasch. 3 Car. C. B. the suggestion ought to be, that he libelled for rakings after the corn was got in, &c. involuntarily scattered; and upon such suggestion a prohibition will be granted. Cicil v. Scot.

Tithes shall be paid of *rakings of corn*, because the tenth cock or sheaf is no satisfaction for more than the grain whereof it is the tenth, and therefore it is not the tithes of the rakings. Mo. 278. pl. 432. Trin. 31 Eliz. C. B. Berd v. Adams. — Sav. 100. 101. pl. 180. S. C. held accordingly. — Cro. E. 446. pl. 10. Mich. 37 & 38 Eliz. C. B. cites it as adjudged in Sir Cha. Morrisow's Case, that where one prescribed to pay the tenth part of corn in the sheaf for the tithes of all which is in sheaf and of all which is raked, to be a void prescription; because he is to pay tithes of both of them; besides it is unreasonable, for then he may put the lesser part in sheafs, and leave the greater part to be raked.

Tithes shall not be paid of rakings unless they are *foal rakings*; cited by Popham to have been adjudged. Cro. E. 475. pl. 3. Trin. 38 Eliz. B. R. — Cro. E. 363. S. P. Arg. cited to have been ruled, and the court agreed to the case of rakings; for that is as good corn as any other. — Cro. E. 702. pl. 21. Mich. 41 & 42 Eliz. B. R. Green v. Hun. a prescription was allowed to make barley into cocks, and to pay the 10th cock in satisfaction of the tithes of the barley and of the rakings *minus voluntarie disperfed*. It was demurred to because it was not averred that the rakings were minus voluntarie disperfed; and moved, that in 31 Eliz. it was ruled in C. B. in one ADAMS'S CASE, that a prescription to pay the tenth cock generally in satisfaction of all rakings was not good; for he might leave the greater part of the corn in rakings. But the court held the prescription good, and that there needed no averment but that ought to come on the other side if he would. — Mo. 278. pl. 432. cites it as adjudged Mich. 41 & 42 Eliz. B. R. GREEN v. KEN, that by the custom of the realm tithes shall not be paid for rakings. — S. C. cited as adjudged Mo. 910. in pl. 1280.

For rakings of corn no tithe is payable, if they were involuntary; but if there was any fraud in leaving more than was necessary, then tithe should be paid. Freeman. Rep. 335. pl. 416. Mich. 1698. in Scacc. Anon. — S. P. by Twifden. Mod. 121. pl. 24. Pasch. 26 Car. 2. B. R. Anon.

[12. But for *rakings voluntarily scattered, and upon a collusion*, tithes shall be paid. My reports 11 Ja. Mich. 14 B. R. between Joyfe and Parker, agreed per Croke, Houghton, and Doderidge. H. 14 Ja. B. R. * Peck and Harris, per Curiam adjudged. Mich. 3 Ja. B. R. per Popham. P. 7 Ja. B. per Curiam.]

* Roll. Rep. 739. Pitt v. Harris. S. C.

[13. Where the *prohibition* is of tithes of *rakings*, the *suggestion* ought to be, that they were *minus voluntarie sparfe*, otherwise it is not good, for it is not sufficient to say they were *lapfe*, & *disfipate* in collectione. Hill. 14 Ja. B. R. Peck and Harris, adjudged, scilicet a consultation granted.]

Roll. Rep. 379. pl. 35. Pitt v. Harris. S. C. a prohibition was granted; and it

was said the party carried it into his barn; and a prohibition was granted, and Coke Ch. J. said, that the prohibition being granted, let the party now plead it, if he would have a consultation. — Whether voluntarily scattered or not is no cause of prohibition but of appeal; for this is within the consueance; but if they agree them to be rakings and involuntarily scattered and yet adjudge payment a prohibition lies, it being contrary to our law. 3 Keb. 284. pl. 6. Pasch. 26 Car. 2. B. R. Peters v. Brideaux.

Cro. J. 575. [14. If a man *shears* his sheep about their necks to preserve them from vermin, and not for the benefit of the wool, the parson shall not have tithe for this.] Trin. 18. Jac. Jouce v. Parker. S. P. ——— 3 Bulst. 242, 243. Fosse v. Parker. S. C. the suggestion appearing to be, that for this they used to wind up the other fleeces at their own charge, a prohibition was granted.

3 Bulst. [15. But *otherwise* if he shear them largely by covin for the benefit of the wool. Mich. 14 Ja. B. R. between Joise and Parker, per Curiam.] 242, 243. Fosse v. Parker. S. C. & S. P. by Doderidge and Crooke admitted.

[589] [16. So if he shear them about their necks without fraud but two weeks before Mich. and two weeks after Mich. to preserve them and their fleeces from the brambles, no tithes shall be paid for them, for it appears that he does not shear them for the benefit of the wool, this being done at this time before the fleeces are increased after the shearing of their whole bodies. Mich. 14 Ja. between Joise and Parker, agreed per Curiam, præter Mountague, who doubted.]

{ Fol. 649. [17. If a parishioner cuts his dirty locks from his sheep, for their better preservation from the vermin before the time of sheering, and does this without fraud, no tithes shall be paid of these. P. 14 Car. B. R. between Dent and Salvia per Curiam, and a prohibition granted accordingly. Mich. 14 Car. B. R. between Williams and Wilcox a prohibition granted; but there was a consideration surmised, scilicet, that he wound up the tenth fleece for the parson.]

Litt. Rep. [18. If a man kills sheep, yet he shall pay tithe of the wool that comes off them, but not for the skins. P. 14 Car. B. R. between Dent and Salvin, per Curiam.] 31. Pasch. 3 Car. C. B. Cicil v. Scott, a prohibition was granted to libel for wool pilled from sheep killed for the house or dead, &c.

Cro. C. 393. [19. No tithes shall be paid of the hay that grows upon the headlands where the horses and plough turn, when the land is ploughed, if there be alleged a custom not to pay it, and it be also averred that the head-land is but sufficient to turn the plough. Hill. 10. Car. B. R. between Mead and Thurland, per Curiam, a prohibition granted. P. 15 Car. between Birde and White, a prohibition granted per Curiam with the said averment, that the head-land was not greater than what was sufficient to turn the plough upon in ploughing the land.] pl. 4. Meade v. Thurman. S. C. & S. P. and a prohibition granted. Jo. 357. S. C. but S. P. does not

appear. ——— 2 Le. 70. pl. 93. Hill. 29 Eliz. C. B. agreed that it is a reasonable prescription that the party shall have the hay upon the head-lands in recompence of the reaping, binding and shocking, and the hay there is but of little value. ——— Lane 16. Hill. 4 Jac. in Scacc. Anon. S. P. a prohibition lies but some held that he ought to suggest that they are but small head-lands and that there is a custom of discharge in consideration that he paid tithes in kind of meadows. ——— Litt. Rep. 13 Hill. 2 Car. C. B. Richardson cited S. P. to have been agreed by Hutton and Yelverton only in court that prohibition should be granted; for the defendant is discharged of tythe in this case for necessity; because it is left for the turning of the plough and is parcel of the plough land, whereof the parson hath the tithe of corn and the farmer cannot plough his land without leaving it and says that this is the reason of the case 22 E. 4. 8.

See (D. 2) pl. 10. S. C.

20. A prohibition was prayed to a suit for tithes of *locks of wool*, suggesting that he paid the 10th fleece of wool in satisfaction of all locks and tithes due for wool. The court held the substance of the prescription good enough, but the *suggestion* not being (*what they had usually paid, &c.*) which is issuable, it was not good; and therefore a consultation awarded. Cro. E. 363. pl. 26. Mich. 36 & 37 Eliz. C. B. Jesop v. Payne.

21. Tithes shall be paid for *sheep depastured on turnips*, though tithe wool was before paid of them. It was strongly insisted, that it a double tithing, but the court agreed, that it was a *new increase*, and decreed that defendant should go to an account. G. Equ. R. 231. Pasch. 12 Geo. in Scacc. Coleman v. Barker.

So for sheep depastured on other land from sheering time, it was decreed M. Dümmer

accordingly, and the decree affirmed on a rehearing. G. Equ. R. 231. cites 1 W. & v. Wingfield.

22. A prohibition was granted to a libel for tithes of *old rotten trees cut for fuel*, and also for tithes of *loppings* of trees, which loppings were not of twenty years growth. 2 Roll. Rep. 495. Hill. 22 Jac. B. R. Scott v. Eyre.

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23. Of wool of *rotten sheep*, no prohibition, though alleged, that he shall have tithe wool for the same thing again at sheering time. Lat. 254. Mich. 9 Car. Anon.

24. If a parishioner sells sheep, the parson shall have allowance of tithes of them *after the sheering*; per Jones. Lat. 254. Mich. 3 Car. Anon.

25. Prohibition was granted to stay a suit for tithe of wood upon furnace that the *wood was spent in his house for firing*, and shews that the custom in the same parish is, that the owners of any house and land in the said parish who pay tithes to the parson, ought not to pay tithes of wood spent for fuel in their houses; and issue being upon this custom; it was found for the defendant and moved in arrest of judgment, that although it be found that there is no such custom, yet he ought not to pay tithes for wood spent in his house, nor for *fencing stuff for hedges*, but per legem terræ ought to be discharged of them; but the court resolved that *it is not de jure per legem terræ that any be discharged of them*; for it is usual in prohibitions to allege customs, as for hearth-penny, or by reason of other lands whereof he pays tithes, that he is discharged of that tithe, but not to allege, that per legem terræ he is discharged, and the plaintiff here having alleged a custom, and being found against him, it was adjudged for the defendant, that consultation should be granted. Cro. C. 113. pl. 5. Trin. 4 Car. C. B. Norton v. Fermor.

Hetl. 88. S. C. Sed adjournatur to search precedents. — Ibid. 110, 111. S. C. but no resolution. — But Ibid. 117. a consultation was granted, because of a custom alleged and found for the party; but by Crook and Yelverton there are

precedents where in that case a prohibition was granted without alleging a custom. Litt. Rep. 152, 153. Norton's case S. C. adjournatur. — Whether tithes shall be paid for fuel spent in the house, where is no custom, they said they should not determine, it being no point in this case, and there being opinions both ways. 1 Cro. 113. was cited at the bar that such fuel shall not be discharged without a custom. Freem. Rep. 335. pl. 416. Mich. 1698 in Scacc. Anon.

26. A libel was for *feeding cattle* upon the ground, to which the defendant answered, that they were *ancient milch beasts*, and were *growing old and dry*, and that *for a month they depastured with other beasts*, and that afterwards they put them into a meadow

out of which the hay was carried, and after he fed them with hay in the house. The court agreed, that tithe should not be paid for the depasturing or the hay with which they were fed; but as *for the time they went with the other heifers*, Crook and Hutton held that *tithes should be paid* for them. Het. 100. Trin. 4 Car. C. B. Anon.

27. A. has a *house and lands in the parish of B. and other lands in the parish of C. milk arising in the parish of C. shall pay tithes though spent in the house at B.* Ld. Raym. Rep. 129. Mich. 8 W. 3. Scoles v. Lowther.

28. If a man has *arable land without a house*, he is not intitled to be discharged of the tithes of the *milk* which maintains the servants, who plow the land, as he is if he has a house in the parish where the milk is spent. Ld. Raym. Rep. 129. Mich. 8 W. 3. in case of Scoles v. Lowther.

29. Where a man has *wood in one parish and arable lands in another*, if he makes use of this wood in making *fences for his arable land*, yet he shall pay tithes to the parson where the wood grows. But it had been otherwise if it had been in the same parish; per Cur. Ld. Raym. Rep. 130. Mich. 8 W. 3. in case of Scoles v. Lowther.

[591] 30. *So where the wood grows in one parish and is spent in the owner's house in another parish*; per Cur. Ld. Raym. Rep. 130. Mich. 8 W. 3. in case of Scoles v. Lowther.

31. Bill for a discovery of tithe of furze and payment thereof. Defendant by answer insists that *furze spent upon the premises* is not titheable, and likewise insists that underwood and furze generally is not titheable in that parish, &c. Plaintiff admits that no tithes is due for underwood or furze spent upon the premises, but insists upon tithe of *furze made into faggots* and sold by defendant, cites Moor 909, that underwood or furze spent for firing or fencing of the premises is not titheable, but underwood or furze sold is titheable. In the proofs of the cause there was some evidence of 1 d. per ann. paid called *smoak-money* in lieu of tithes or furze, but that not being insisted on by the answer, but a general non decimando for underwood and furze, decreed defendant to account for tithes of *furze made into faggots* and sold, but not for furze burnt or used upon the premises. Defendant to pay costs. Per Harcourt C. MS. Rep. Mich. 12 Ann. in Canc. Roffe v. Harding,

(A. a) Wages. [Pl. 1.]

[And Feedings and Agistments of Cattle.]

[1. *SERVANTS* of the plough shall not pay any tithe of their wages; as was resolved, P. 14 Jac. in Banco, between Parson Ellis and Drake in Devon, and a prohibition granted

granted accordingly, although the libel was but for the tithe of a third part of their wages, leaving the rest free; for it was said, that by the same reason that the beasts of the plough shall be free of tithes, the servants who follow the plough shall be also.]

[2. No tithes shall be paid for the *feeding* which is eaten by *the oxen of the plough and the cattle of the pail*. Mich. 9 Ja. B. between Backster and Hope, per Curiam.]

prescription was good. — S. C. cited Roll. Rep. 38. that a consultation was prayed after a prohibition, but not granted. — Hettl. 100. Trin. 4 Car. C. B. Anon. S. P. — But if they are afterwards fattened for sale tithes are payable for their herbage. Parliament cases 193. Pastmond v. Sands cited G. Equ. R. 231. in case of Coleman v. Barker. — Mar. 56. pl. 87. Mich. 15 Car. Anon. S. P. and Barkley J. only in court granted a prohibition. — Of common right no tithes are due for cattle bred for the plough or pail to be used in the same parish, but if they belong to another parish, tithes are due for them, and of that opinion were the whole court. Hardr. 184. Pasch. 13 Car. 2. in Scacc.

[3. No tithes shall be paid for *horses of the plough*, for the parson hath the benefit of their labour in his tithes of the grain. Tr. 15 Ja. B. between Bell and Tarde, a prohibition granted.]

age; but for cart-horses to till the ground, allowance is to be made for their herbage, because a profit comes in by them, but not by saddle-horses. Per tot. Cur. Bulst. 171. Trin. 9 Jac. Pothill v. May. — S. P. as to saddle-horses, cited by Richardson, that a prohibition was granted. Het. 94. Pasch. 4 Car. C. B.

No tithes is to be paid for saddle horses or their her-

[4. Tithes are not due for *young cattle which a man rears for his plough*, for they are for the manuring of the land, of which the parson shall have the tithe. M. 14 Ja. B. Watley and Hanberry † resolved, and a prohibition granted. M. 14 Ja. B. R. between * Joise and Parker, resolved, and a prohibition granted. M. 14 Ja. B. R. between Dr. Beste and Williams; and prohibition granted. H. 14 Ja. B. R. between Kneebon and Woodrett, a consultation was denied, a prohibition being granted before. Tr. 12 Ja. B. R. between Mafcal and Price, per Curiam.]

Cro. J. 575: pl. 3. Trin. 18 Jac. Joise v. Parker S. C. & S. P. accordingly, per Cur. — 3 Bulst. 241. Fosse v. Parker.

* Roll. Rep. 38. pl. 2. and 62. pl. 7. S. C. & S. P. admitted per Cur. — 2 Bulst. 239. S. C. & S. P. by Coke Ch. J. to which the whole court agreed, unless it be averred that they were by him fattened and sold away — Cro. E. 702. pl. 21. S. P. adjudged; because they are for the publick weal, and the parson is to have benefit of them in another kind. Green v. Hun. — Mo. 910. pl. 1280. cites S. C. & S. P. adjudged Mich. 41 & 42 Eliz. B. R. — Of common right tithes are not due for cattle bred for the plough or the pail to be used in the same parish, but if they belong to another parish tithes are due for them; per tot. Cur. Hardr. 184. pl. 9. Pasch. 13 Car. 2. in Scacc. in the case of Holbeech v. Whadcocke.

S. C. but S. P. does not appear.

† [592]

[5. No tithes are due for *young cattle that a man rears for his dairy*. Mich. 14 Ja. B. R. a prohibition granted between Joise and Parker. H. 14 Ja. B. R. Kneebon and Woodrett; a consultation was denied, a prohibition being granted before.]

[6. If a man, according to the custom of the country, sows land to feed his horses for tillage, and hath used to suffer his horses to be fed upon the land without any sowing thereof, the parson shall not have any tithes thereof, for this is no more than pasture for the horses. M. 3. Ja. B. R. Per Towse said, that it was one Same's case of Essex adjudged.]

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[7. And in these cases in the prohibition, he need not prescribe to be discharged of tithes for them, because they are discharged by the law. H. 14 Ja. B. R. Kneebon and Woodrett, per Mountague and Doderidge; but Haughton seemed e contra, because their labour (*) is a manner of a modus for their tithes; but Clinch and Clerk said, that of late time they have not used to prescribe; but *anciently the use was to prescribe.*]

Cro. E. [8. If a man buys cattle, and feeds them, and sells them, he shall pay tithes of them. Tr. 38 El. B. R. between Sherington and Fleetwood, per Curiam.]
475, 476. pl. 3. S. C. & S. P.
held, per tot. Cur. — Gouldsb. 147. pl. 66. S. C. & S. P. per Popham. — Mo. 909. pl. 1278. S. C. & S. P. resolved.

Cro. E. [9. But if a man buys cattle and feeds them, and spends them in his house, he shall not pay any tithe for them. Tr. 38 El. B. R. between Sherrington and Fleetwood, per Curiam.]
475. pl. 3. S. C. and S. P.
agreed per tot. Cur. — Gouldsb. 147. pl. 66. S. P. per Popham in S. C. — Mo. 909. pl. 1278. S. C. and S. P. resolved.

Cro. C. [10. If a man feeds sheep in his land, and after kills and eat them in his house within the parish, he shall not pay tithes for them. Mich. 7 Car. B. R. between Facey and Lange, per Curiam upon a demurrer,]
237. pl. 20. Facy v. Long. S. C. and S. P.
per Cur. — Jo. 254. pl. 5. S. C. but S. P. does not appear. — Ibid. 447. pl. 11. S. C. but not S. P. — Litt. Rep. 13. Hill. 2 Car. C. B. the S. P. cited by Richardson as agreed accordingly, and a prohibition granted.

[11. If a man gathers green pease to eat in his house, no tithes shall be paid of them, and this by the law of the land. P. 12 Ja. B. per Curiam.]

[12. But otherwise it is if he gathers them to sell or feed hogs P. 12 Ja. B.]

[593] [13. If a man buys barren cattle, as oxen or steers, and after sells them, he shall pay tithes for their pasture, because they can render no other tithe; but otherwise it is of barren sheep, scilicet, wethers, because they will render tithe of their wool. Mich. 7 Car. B. R. between Facy and Lange, per Curiam.]
Cro. C. 237. pl. 20. S. C. but not S. P. as to cattle.
— Jo. 254. pl. 5. and 457. pl. 11. S. C. but not S. P.

Cro. J. [14. If a man keeps horses that are barren cattle to sell, and sells them accordingly, he shall pay tithe for them. Tr. 15 Ja. B. R. between Lampkin and Wilde, per Curiam.]
30. pl. 8. Hampton v. Wild. S. C. and S. P. admitted per Cur.

[15. If a man buys young cattle, and rears and sells them, he shall pay tithes for them. Tr. 38 El. B. R. between Sherington and Fleetwood, per Curiam.]

[16. So if a man buys cattle, and feeds and sells them, he shall pay tithes for them. Tr. 38 El. B. R. between Sherington and Fleetwood, per Curiam.]
See pl. 8. S. C. and the notes there.

17. Where

17. Where *beasts are in one parish for one half year, and in another parish during the rest*, every parson shall have tithes for the time. Br. Dimes, pl. 16. cites the register.

18. If the parson has tithe for the corn of the same land, he shall not pay tithe for *agistment*. Br. Dimes, pl. 18. cites the register.

19. Libel for tithes of milch cows, steers, oxen, and horses &c. the defendant suggested for a prohibition, a *modus to pay 1d. every year for a milch cow, and an half-penny for every other cow, and the like for every mare, in satisfaction of all cows, steers, horses and other cattle*, but a consultation was granted *dummodo non tractetur of milch cows, of oxen for the plough, nor of beasts depastured for the profits of the house*. Moor 911. pl. 1282. Mich. 38 & 39 Eliz. C. B. Gresham v. Lucap.

tithe by the payment of another. For he ought to pay something for the tithe of every thing which is due. And a special consultation was afterwards awarded *dummodo non agatur de decimis for milch kine, draught oxen or beasts agisted for provision of his house*—2 Inst. 251, 252. S. C. cited.—S. C. cited Cro. E. pl. 3.—S. C. cited Mo. 454. in pl. 623.

Cro. E. 446. pl. 10. Griffman v. Lewes S. C. & per tot Cur. this prescription is not good to be discharged of one

20. Tithes are payable for *agistment, viz. for the feeding of dry cattle*, which do not serve for the plow or pail, nor are spent in the family. Jenk. 281. pl. 6. cites it as resolved by all the judges of England in the Exchequer Chamber. 3 Jac.

For beasts agisted for hire, tithes shall be paid: per tot. Cur.

Cro. E. 476. in pl. 3. Trin. 38 Eliz. B. R. contra to F. N. B. 53. (G)—Cro. E. 446. pl. 10. Mich. 37 & 38 Eliz. C. B. in case of Gryfman v. Lewis S. P. held per Cur. & F. N. B. 53 (G) denied to be law.

21. The defendant suggested a prescription to be discharged of *tithes of barren cattle reared or employed for the plow*; and upon a demurrer to this prohibition, it was objected that he had not alleged, that the cattle for whose herbage this suit was brought, were reared for the plow, or employed for that purpose; he likewise prescribed to be discharged of *tithes of the herbage of cattle fattened in the parish, in consideration that all they who had milch cows there had paid tithes of milk, butter, and cheese, and nine cheeses every year on a certain day, and did not allege that he had any milch cows*, for which reasons a consultation was granted. Roll. Rep. 62. pl. 7. Mich. 12 Jac. B. R. Mafcall v. Price.

22. No tithes shall be paid for the herbage of *sheep*, because they are *fructuosa animalia*. Roll. R. 63. pl. 7. Mich. 12 Jac. B. R. in case of Mafcall v. Price.

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23. Prescription to be discharged of payment of tithes for all cattle agisted generally, and not saying for his own proper cattle, is not good, nor reasonable, and stands not with law. Cro. J. 755, 756. pl. 3. Trin. 18 Jac. B. R. Jouce v. Parker.

2 Roll. Rep. 191. Johnson v. Parker. S. C. & S. P. by Doderidge J.

24. A man agisted the beasts of others in his meadow-ground, whereof he had paid tithes before; resolved that he shall not pay tithes for this feeding it with the beasts of others after the mowing, any more than if he had depastured the land with his own beasts. 2 Roll. Rep. 191, 192. Trin. 18 Jac. B. R. cites Sherrington v. Fleetwood.

25. Libel

Dismes, [or Tithes.]

25. Libel was in the Spiritual Court for the tenth part of a *bargain of sheep which had depastured from Michaelmas to Lady-day in the parish*; the party surmised that he would pay the tenth of the wool of them according to the custom of the parish; prohibition was denied, for as Doderidge J. said, by this way the parson may be defrauded of all if he shall not have his recompence; for now the sheep are gone to another parish, and he can't have any wool now, because it is not shearing-time. Nota, per Whitlock J. *De animalibus inutilibus* the parson shall have the tenth part of the bargain for depasturing, as horses, oxen, &c. But *de animalibus utilis* he shall have tithes in specie, as cows, sheep, &c. Poph. 197. Mich. 2 Car. B. R. Anon.

26. Though no tithes shall be paid for *young cattle* which a man rears *for his plough*, yet if they are *sold before they come to perfection*, the parson will have tithes. Het. 86. Arg. Pasch. 4 Car. C. B. Woolmerston's case.

27. If I have 10 milch kine which I purpose to reserve for calves, and they are dry, the parson shall not have tithes for their pasture; But if I sell them, by which it appears I kept them for fattening, there tithes shall be paid, per Harvey J. Het. 100. Trin. 4 Car. C. B. Anon.

28. In a suit by English bill for the tithes of the herbage of barren cattle, and others; the Chief Baron said, that tithes for barren cattle were due de communi jure according to the value of the land after the rate of 2s. per pound, for that they cannot be otherwise valued or accounted for, because the profits of the lands for which they are paid, are received by the mouths of the beasts; but by custom or prescription such tithes may be paid in other manner, as by the acre and for all manner of cattle barren, and for the plow and the pail. Hardr. 184. pl. 9. Pasch. 13 Car. 2. in Scacc. Holbeeck v. Whadcocke.

29. If a man agists cattle such as are unprofitable, and yielding no tithe in kind as horses, &c. there the party that takes them in, viz. the owner of the ground, shall answer the parson the tithe according to the rate he has for their depasturing. But if a man agist profitable cattle, and such as yield a tithe in kind, as sheep that yield tithe-wool, and lambs, there the owner of the cattle shall answer the tithes, because the wool and lamb in kind were due to the parson, and it is impossible that the owner of the ground could pay that. This difference was taken by Sir Robert Sawyer, and agreed per Cur. Freem. Rep. 329. pl. 408. Pasch. 1679. in Scaccario. Anon.

30. If cattle don't plow in the same parish where they are fed, tithes are due though they plough in another parish; and if he had more cattle than employed for the plough in the same parish, tithes are due for them. 5 Mod. 97. Trin. 7 W. 3. Swales v. Lowther. S. P. by Holt Ch. J. because they are not cattle of the plow there. 7 Mod. 114. Mich. 1 Ann. B. R. in Harrow's case.

[595] 31. Tithe of agistment of barren cattle is due of common right. 2 Salk. 655. pl. 1. Hill. 8 W. 3. B. R. Hicks v. Woodson.

And see S. C. fuller, and the notes there (H. a.)

32. A. has a *house* in B. in which he dwells and occupies a large parcel of arable land there, and has likewise 40 acres of meadow and pasture in the parish of C. adjoining, and four acres of arable land there. The plowing land in C. will excuse only those cattle which plow only the land in C. and not those which plow any land in B. For the parson ought to have something in lieu of the loss of those tithes, which can only be of the four acres in C. Per cur. Lord Raym. Rep. 130. Mich. 8 W. 3. Scoles v. Lowther.

33. Where the parson has *tithe-hops*, no tithes should be paid for the poles which were used in the hop-yard; and the question arose whether the parson should have tithes of the bark of the poles, the bark being sold? And by Letchmere he should. But the Ch. Baron and the others e contra; for the poles being privileged, the bark shall be so too. Freem. Rep. 334. pl. 416. Mich. 1698. in Scacc. Anon.

34. But for fuel spent in fire to dry the hops tithes should be paid, because the parson had no benefit by that, the tithes being paid before they were dried. Freem. Rep. 334. pl. 416. Mich. 1698. in Scacc. Anon.

35. By the common law pasturage is as much tithable as hay, but the difference is, pasturage being taken by the mouth of cattle, but the hay is tithable before it is severed from the ground; pasturage shall pay no tithe, but the cattle, that feed it, shall; but cattle of pail and plow shall pay no tithe if you feed them upon pasture, all the year long; and the reason of that is, for that they are as tools of husbandry, by which tithes are meliorated. And no tithe is originally due by law in that case; but tithe is originally due upon mowing of the grass; and your subsequent application of it, though to cattle of pail and plow shall not discharge you of a charge to which you were liable before upon the mowing. And the grass is tithable only in respect of the feeding, that is, the use and application makes it tithable; and for that you cannot have any other tithe than from the profit of the cattle that do feed it; Per Holt Ch. J. 12 Mod. 497, 498. Pasch. 13 W. 3. Selby v. Bank.

36. If a man has a house in a parish, and lives there, he must not pay agistment for dry cattle there; but if he be not a housekeeper there, he must pay tithes for agistment; Per Holt Ch. J. 7 Mod. 124. Mich. 1 Ann. B. R. in Harrow's case.

(A. a. 2.) Tithes of Mills. Payable in what Cases. [598]

See (F. a.)
(M. a.) and
(Q.) pl. 19.

1. **TITHE** of mills shall not be paid but where it used to be paid. Per Coke C. J. Roll. Rep. 405. pl. 15. Trin. 14 Jac. B. R. in Jaques's case.

3 Bullst.
212. S. C.
That no
personal

tithe by the statute is to be paid for mills, but where by special usage the same has been paid, and not otherwise.

2. *De molendino de novo erecto non jacet prohibitio* as to tithes (though

(though the mill was erected upon lands discharged of tithes) by the statute of monasteries. Cro. J. 429. Trin. 15 Jac. B. R. Anon.

3. Libel for tithes of a *grist-mill, a fulling-mill*; the defendant suggested for a prohibition, that though by the statute *de articulis cleri* it is enacted, that *de molendinis non fiat prohibitio*; yet that must not be intended of fulling-mills, the profits whereof arise by the labour of men, and therefore not within the words of the statute *de molendinis*; and a prohibition was granted as to the fulling-mill and a consultation as to the grist-mill; but tithes shall not be paid for *tin mills, lead-mills, plate-mills, rag-mills, edge-paper-mills*, because the profit arises by the labour of men. 2 Roll. Rep. 84. Pasch. 17 Jac. B. R. Anon.

4. If two fulling mills are under one roof, and a *rate-tithe* paid for the mills and then you *alter the mills* and make one a corn mill, the rate is gone, and you must pay tithe in kind. Brownl. 32. Anon.

Tithe of
mills is
by the
statute of
*articuli
cleri*.

Arg. Litt. R. 102.—Arg. Show. 24. cites 12 Rep. 36.

Ibid cites
Hill. 5
Car. C. B.
Pain v.
Evans.

—Ibid
cites Pasch. 10 Car. S. P.

5. *Tithes* are due and payable of all mills *unless they are ancient and before 9 E. 2.* For mills more ancient are discharged by the statute *art. cleri*. D. 170. 4. Marg. pl. 5. cites Hill. 5. Car. C. B. that it was so resolved in *Stoake's case*.

6. Motion for a prohibition to stay a suit for tithes of an old mill, viz. every tenth toll-dish on suggestion that it was an old mill, but per Holt Ch. J. the plaintiff ought in his suggestion to prescribe in non decimando, and also an affidavit of the truth of the fact; and so it was adjudged in Ld. Ch. J. Hale's time in the like case; for he said that of common right tithes are not due out of a mill, yet before the statute of *articuli cleri* some mills did pay and some did not, and upon that it was enacted that *de molendinis de novo erectis non jacet prohibitio*; and for such as paid before that statute they shall still pay; and he said, tithes were either predial or personal, for the corn paid tithe before; and it is necessary to prescribe in non decimando in an old mill; and he quoted the case of *Hughes and Lord Viscount Hertford*. 12 Mod. 243. Mich. 10 W. 4. Hart v. Hall.







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